

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL CASE NO. HAM 05 OF 2023

BETWEEN : **MATAIASI CURU**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. T. Tuenuku for the Applicant.
: Ms. S. Ali for the Respondent.

Date of Hearing : 08 March, 2023

Date of Ruling : 22 March, 2023

RULING

[Application for bail pending trial]

1. This is an application for bail pending trial. The applicant through his counsel makes this application by filing a Notice of Motion supported by his own affidavit sworn on 9th January, 2023. The applicant has also filed his affidavit in reply sworn on 15th February, 2023.

2. The application filed by the applicant is opposed by the state. The state in its opposition to bail has filed the affidavit of WPC 6286 Shanell sworn on 9th February, 2023.

BACKGROUND INFORMATION

3. In the substantive file the applicant faces the following allegations:
 - a) Three counts of rape;
 - b) One count of sexual assault;
 - c) One count of assault causing actual bodily harm; and
 - d) One count of breach of domestic violence restraining order.
4. The applicant deposes that he has been in remand from 8th November, 2022. He admits that the complainant is his defacto partner. If bail is granted he will reside out of Lautoka with an uncle in Nawaka or relocate to Nadali, Nausori and stay with his aunt.
5. The applicant further states that he understands the seriousness of the offences he has been charged with and he is also happy to abide by all the bail conditions and is willing to surrender to custody when required. He does not any previous convictions or any record for absconding bail or escaping from lawful custody.
6. The applicant is also happy to provide two sureties as part of his bail bond security.
7. The applicant is willing to abide by any bail conditions that may be imposed by this court should bail be granted. The applicant also suggests the following additional bail conditions:
 - a) Surrender of Passport;

- b) Imposition of non-contact orders;
- c) Complete restriction in entering Lautoka except for court dates.

8. In her affidavit in opposition the Investigating Officer WPC. Shanell states that the alleged offences are serious, the prosecution has a strong case whereby a conviction is inevitable. The applicant was issued a domestic violence restraining order in respect of non-molestation of the complainant, however, despite being aware of the orders the applicant has breached the same.

LAW

9. Section 3 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. There is a presumption in favour of the granting of bail but the person who opposes may seek to rebut this presumption. 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.

10. Under section 17 of the Bail Act when deciding whether to grant bail to an accused person the court must take into account the time the person may have to spend in custody before trial if bail was not granted. The primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charge laid against him or her.

11. Under section 19 of the Bail Act an accused person must be granted bail unless in the opinion of the court:
 - 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 will not be served through the granting of bail;
 - c) granting bail to the accused would endanger the public interest or make the protection of the community more difficult.

DETERMINATION

12. The state counsel in his submissions also stated that the defacto partner of the applicant is a crucial witness in that she is the alleged complainant to the allegations. This aspect is not denied by the applicant. Counsel further submits that the breach of the domestic violence restraining order is a serious issue. The applicant breached the trust of the court by assaulting the complainant when he was bound by the conditions of non-molestation orders. If granted bail the complainant will be at high risk of been harmed by the applicant who disrespected the court order issued and served on him.
13. Counsel further submitted that considering the closeness of the relationship between the applicant and his defacto partner there is a real possibility that the applicant once released on bail may interfere with this witness.
14. The Court of Appeal in *Eliki Seru v State* [2015] FJCA 30; AAU 0152 of 2014 (27 February, 2015) at paragraph 8 explained the meaning of likelihood of interference with witness in the following words:

As required by section 18(2) of the Bail Act 2002, the trial judge considered each of the criteria and concluded that it was in the public interest to revoke the appellant's bail in light of the fact that the complainant withdrew her police complaint a week before the trial was scheduled to commence and that there was a strong likelihood that she had been interfered with. The word likelihood as used in the Bail Act 2002 does not connote probability. In Livingstone-Thomas v Associated Newspapers Ltd (1969) 90 W.N. (Pt.1) (NSW) 223 Wallace P said at 229: "[I] think the legislature has meant 'likely' in a sense of a tendency or real possibility". This meaning was adopted by Wilson J in Kysely, Re Bail Application [1980] PNGLR 36; 14 April 1980 when considering a similar phrase in the Bail Act 1977 (PNG):

"I hold that the word "likely" in the phrase "likely to interfere with witnesses" in s. 9(1) (f) means likely in the sense of a tendency or real possibility. It does not mean "more likely than not", "probably", or "very likely".

15. This court is mindful that the presumption of innocence is very much in favour of the applicant and that the applicant has been in remand for a little over four months now. In *State vs. Albertino Shankar and Francis Narayan*, Misc. No. HAM 14 of 2003 Gates J. (as he was) at paragraph 9 had observed:

"The Bail Act 2002 has encapsulated long standing principles of the Common Law and provides guidance to persons charged with the duty of deciding bail, and on the priority of competing considerations. First, the Act makes clear that there is for every accused person an entitlement of bail [Section 3 (1)]. This does no more than reflect the principle of the presumption of innocence, which is also stated by the Constitution [Section 28 (1) (a)]. Section 3 (6) however also states that entitlement will fail if it is not in the interests of justice that bail should be granted."

16. Under section 13 (4) of the Bail Act a person can be kept in remand for 2 years or more if the interest of justice so requires.
17. The applicant strongly argues that the merits of the prosecution case are not a matter for consideration at this point in time but a trial issue. The applicant's counsel submits that the applicant has two sureties to offer and any strict bail conditions can be imposed. The applicant assures the court that he will abide by all his bail conditions and he has no intention of breaching any of his bail conditions.

LIKELIHOOD OF SURRENDER TO CUSTODY

18. The state does not dispute the applicant's background, however, the charges against the applicant are serious which carries an imprisonment term if convicted.
19. The state relies on direct evidence and most importantly on the applicant's defacto partner to prove the charges against the applicant. There is a real possibility and likelihood that the applicant may interfere with this witness and no strict conditions of bail will be able to police this.

INTEREST OF THE ACCUSED

20. The applicant argues this is a 2022 matter and he needs to pay his expenses and get back to normal life by finding an employment. At present only his plea has been taken.

PUBLIC INTEREST AND THE PROTECTION OF THE COMMUNITY

21. The state counsel contends that looking at the actions of the applicant and the serious nature of the offences alleged it is not in public interest that

the applicant be granted bail. Granting of bail will encourage the applicant to interfere with the prosecution witnesses in particular the defacto partner of the applicant.

CONCLUSION

22. After considering the evidence and the submissions made, in my view the concerns raised by the state counsel are valid. This court is mindful of the fact that the applicant has no previous convictions and that the presumption of innocence is in favour of the applicant. However, looking at the conduct of the applicant in disregarding the domestic violence restraining order and the allegation of assault resulting from the alleged breach of the court order and the risk associated with the likely interference and harm that can be caused to the complainant by the applicant it is not in the public interest that the applicant be granted bail.

23. It is not disputed that the applicant was served with the domestic violence restraining order on 19th October, 2022 and the allegation of the breach of the orders came in close proximity between 5th to 8th November, 2022. There is also a real likelihood that the applicant whilst on bail may interfere or harm his defacto partner who is a crucial witness in this case.

ORDERS

- a) The application for bail pending trial is refused;
- b) Both counsel are to ensure that all pretrial issues are attended to as soon as possible;
- c) The earliest available trial date is September, 2023;

d) 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

22 March, 2023

Solicitors

Office of the Legal Aid Commission for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.