

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 052 of 2019**  
**[High Court Criminal Case No. HAM 006 of 2019]**

**BETWEEN** : **ROBERT MON WAQALEVU**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Calanchini, P**  
**Basnayake, JA**  
**Prematilaka, JA**

**Counsel** : **Ms. Nasedra. S for the Appellant**  
**Ms. Kiran. S for the Respondent**

**Date of Hearing** : **12 September 2019**

**Date of Judgment** : **03 October 2019**

**JUDGMENT**

**Calanchini, P**

[1] I have read in draft form the judgment of Prematilaka, JA and agree that the appeal should be allowed.

**Basnayake, JA**

[2] I agree with reasons and conclusions of Prematilaka, JA

**Prematilaka, JA**

- [3] This appeal has been lodged against the Ruling dated 03 May 2019 refusing bail pending trial by the learned High Court Judge upon the appellant's application to the High Court for bail pending trial.
- [4] The Appellant had been charged under two counts of rape in the High Court of Suva in Case No. HAC 420 of 2018 contrary to section 207(1), 2(a) and 2(b) of the Crimes Act. He is alleged to have committed one digital rape and one penile rape on 27 October 2018 on two complainants without their consent at Suva in the Central Division. The appellant had first appeared in Suva Magistrate Court on 30 October 2018 and has been on remand in custody since then. He had preferred a standard bail application to the High Court by himself on 04 December 2018. Later Legal Aid Commission has come to his assistance and filed a supplementary affidavit on his behalf on 04 March 2019.
- [5] The jurisdiction of the Court of Appeal to determine this appeal is given pursuant to section 21 (3) of the Court of Appeal Act Cap 12 (the Act) which states:
- “(3) The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal to bail, including any conditions or limitations attached to a grant of bail, upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.”*
- [6] **Artika v State** AAU33B of 2011: 21 March 2012 [2012] FJCA 14 laid down the features of this jurisdiction as follows.
- (i) They are appeal proceedings and not an application for bail.
  - (ii) It is also different from the original jurisdiction of the Court of Appeal under section 35(1) of the Court of Appeal Act to admit an appellant to bail pending appeal by a full bench or a single Judge in terms of section 33(2).
  - (ii) Such an appeal should be determined by three Judges of the Court of Appeal and not by a single Judge.
  - (iii) Leave has to be granted prior to the appeal being considered.

- (iv) It is appropriate for the Court of Appeal to determine whether leave should be granted, and if so, proceed to determine the appeal at the same time.

[7] The powers of the Court of Appeal in respect of such an appeal are set out in section 23 (4) of the Act as follows:

*'On an appeal against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, may confirm, reverse or vary the decision of the High Court.'*

[8] Artika went on to state that when the Court of Appeal exercises jurisdiction under section 21(3) of the Court of Appeal Act it is required to apply the provisions of the Bail Act that relate to an application by an accused for the grant of bail pending his trial in the High Court as opposed to matters set out in section 17(3) which are applicable only in the case of an appellant (*i.e.* an accused convicted and sentenced).

[9] Therefore, the relevant sections for this Court to primarily consider are section 3, section 17(1) and (2), section 18(1) and (2), section 19(1) and (2) of the Bail Act. For convenience I shall quote them below.

[10] Section 3 of the Bail Act is as follows.

*'3.-(1) 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.'*

*(2) Bail may be granted by a court or, subject to section 8(2), by a police officer.*

*(3) 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.*

*(4) 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; or*

*(b) the person has been convicted and has appealed against the conviction.*

*(5) Bail must be granted to an accused person under the age of 18 years, unless-*

*‘a) the person has a previous criminal conviction;*

*(b) the person has previously breached a bail undertaking or bail condition; or*

*(c) the offence in question is a serious one.*

[11] Section 17(1) and (2) on bail determination state that

*‘17.-(1) When deciding whether to grant bail to an accused person, a police officer or court, as the case may be, must take into account the time the person may have to spend in custody before trial if bail is not granted.*

*(2) 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.*

[12] Section 18(1) and (2) on refusal of bail are to the following effect

*‘18.-(1) A person making submissions to a court against the presumption in favour of bail must deal with-*

*(a) the likelihood of the accused person surrendering to custody and appearing in court;*

*(b) the interests of the accused person;*

*(c) the public interest and the protection of the community.*

*(2) If a court decides to refuse bail, it must give a written ruling on each of the criteria in subsection (1), dealing with the submission made on each one.’*

[13] Reasons for refusal bail are given in section 19(1) and (2).

*‘19.-(1) 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; or*

- (c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult*
- (2) In forming the opinion required by subsection (1) a police officer or court must have regard to all the relevant circumstances and in particular-*
  - (a) as regards the likelihood of surrender to custody-*
    - (i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);*
    - (ii) any previous failure by the person to surrender to custody or to observe bail conditions;*
    - (iii) the circumstances, nature and seriousness of the offence;*
    - (iv) the strength of the prosecution case;*
    - (v) the severity of the likely penalty if the person is found guilty;*
    - (vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);*
  - (b) as regards the interests of the accused person-*
    - (i) the length of time the person is likely to have to remain in custody before the case is heard;*
    - (ii) the conditions of that custody;*
    - (iii) the need for the person to obtain legal advice and to prepare a defence;*
    - (iv) the need for the person to beat liberty for other lawful purposes (such as employment, education, care of dependants);*
    - (v) whether the person is under the age of 18 years (in which case section 3(5) applies);*
    - (vi) whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;*
  - (c) as regards the public interest and the protection of the community-*

*(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;*

*(ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person;*

*(iii) the likelihood of the accused person committing an arrestable offence while on bail.'*

[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].

[15] Out of all relevant circumstances, section 19(2) of the Bail Act sets out what matters the court in particular should consider and have regard to as regards the likelihood of surrender to custody and appearing in court, the interests of the accused person and the public interest or the protection of the community.

[16] Needless to say that the list of relevant circumstances to be taken into account in considering releasing an accused on bail is not exhaustive and depends on the facts of each and every case. It is also well established that the bail conditions should not be punitive or excessive so as to negate the very purpose of admitting an accused to bail.

- [17] **Koroi v State** AAU0072 of 2018: 7 March 2019 [2019] FJCA 22 laid down the test in considering an appeal under section 21(3) of the Court of Appeal Act.

*‘[11] On appeal an appellate court reviews a bail decision for an error of principle or fact in the exercise of the discretion granting or refusing bail (R v Payne [Burrett’s Case] [2003] 3 NZLR 638 (CA)). The main argument of the appellant is that the learned High Court judge failed to consider the presumption of innocence when refusing to grant him bail.*

*[12] The Bail Act 2002 (the Act) codifies much of the law relating to bail. Part II of the Act contains provisions of general application. Section 3(1) of the Act states that an accused is entitled to bail unless it is not in the interests of justice that bail should be granted.’*

*‘[13] Section 17(2) of the Act states that the primary consideration in determining whether to grant bail is the likelihood of the accused appearing in court to answer the charge against him or her. Although the primary consideration is whether the accused will turn up for his trial, section 19(1) provides for two further grounds for refusing bail, namely, that the interests of the accused will not be served through the granting of bail (subsection (b)), or that granting of bail to the accused would endanger the public interest or make the protection of the community more difficult (subsection (c)).*

- [18] **Naidu v State** AAU0030 of 2013: 2 June 2014 [2014] FJCA 83 it was held

*‘[4] The refusal of bail by the High Court was within the discretion of the High Court. The principles that guide the exercise of that discretion are governed by the Bail Act. For this appeal to succeed, the appellant will have to demonstrate that the learned High Court judge erred in the exercise of his discretion by acting upon a wrong principle, or by taking into account irrelevant considerations, or by failing to take into account some relevant considerations*

*‘[6] A single judge has no power to grant bail pending trial. The power to grant bail pending trial lies with the Full Court. But the Full Court will only grant bail if there was an error made by the High Court in refusing bail.*

[19] The appellant's grounds of appeal are as follows

- (i) *The learned judge erred in law and in fact when he refused bail of the Applicant without taking into account certain relevant considerations*
- (ii) *The learned Judge erred in law in failing to take into consideration the presumption of innocence until proven guilty.*

[20] I shall now consider each of the above grounds.

First ground

*'The learned judge erred in law and in fact when he refused bail of the Applicant without taking into account certain relevant considerations.'*

[21] The appellant complains that the trial Judge had erred in deciding '*likelihood of accused's surrender to custody*' against him as he was entitled to the presumption of bail; he was a first offender and had no record of previous breach of bail. The only reason given by the trial Judge in the Ruling under this heading is that there is a strong case against the appellant and if found guilty he would be liable to a stiff sentence. Thus, the trial Judge had concluded that chances of the appellant getting bail are slim.

[22] It looks from the legislative scheme of the Bail Act that pending trial, granting of bail is the norm and refusal is the exception. Bail is a right only subject to the 'interest of justice' qualification and therefore it is not an absolute right. Interest of justice is a broad term which could encompass unlimited considerations. The list is not exhaustive. The presumption of bail under section 3(3) holds until rebutted or displaced by the opposing party under section 3(4) and (5). In addition when seeking to rebut the presumption, the party opposing bail must show that there is a likelihood of the accused absconding or it is not in the interest of the accused or it would endanger public interest or make the protection of the community more difficult if the accused is enlarged on bail. Sections 18, 19(1) and 19(2) elaborate these three aspects in detail.

[23] It was held in **Khan v State** AAU0067 of 2018: 29 March 2019 [2019] FJCA that if the prosecution case is potentially strong, the risk of the accused absconding bail is higher and that the strong prosecution evidence can make the appellant a flight risk.



- [24] While one cannot deny that there may be a high tendency for an accused to abscond if he has a strong case against him and the sentence is heavy, it cannot be presumed that in every such case the accused would inevitably be likely not to surrender to custody and appear in court to answer the charges. It has to be decided not in isolation but in the light of all the attendant circumstances. In the light of the fact that the appellant is a first offender not having a history of breaching bail undertaking such an unequivocal inference is not warranted or justified. The affidavit of DC 3079 James filed in the High Court opposing the bail application does not speak to the possibility of the appellant not turning up for the trial. In my mind, it is an error made by the trial Judge in refusing bail.
- [25] The learned Judge had also considered the interest of the appellant and concluded that under that heading too chances of bail are slim. In this regard the trial Judge had taken into account the right to keep suspects in remand for 02 years pending trial and the opportunity to deduct the period of remand from the head sentence. In my view these are not matters that could have been considered under section 19(1)(b) and 19(2)(b) of the Bail Act. He had also taken into consideration the ability of his counsel to visit him in Suva prison to prepare for his defence and the fact that the appellant is not incapacitated. He had specifically stated that there is no valid reason for the appellant to be at liberty for any other lawful purpose. There is no doubt that these are matters that could have been considered under the heading '*interest of the accused*' [vide section 19(1)(b) and 19(2)(b)]. However, if the presumption of bail is to be rebutted under this heading the State must demonstrate to court by way of at least affidavit evidence on which the court could conclude that interest of the accused would not be served by granting bail. The affidavit of DC 3079 James opposing the bail application does not supply any such material to court. The trial Judge has also clearly taken into account some irrelevant considerations in refusing bail.
- [26] However, under section 19(2)(b) the trial Judge had not considered the length of time which is tentatively and approximately 01 year and 07 months, the appellant is likely to have to remain in custody before the case is heard under the heading '*interest of the accused*'.

- [27] The learned trial Judge had also considered '*public interest and 'protection of the community'*'. He had concluded that under this heading also the chances of bail are slim. The reasons given by the trial Judge are that the appellant allegedly raped the two complainants staying with his family and most of the witnesses are related to him. Therefore, the trial Judge had concluded that there is a likelihood of the appellant interfering with the witnesses. The likelihood of the person interfering with evidence is a legitimate consideration [vide section 19(1)(c) and 19(2)(c) of the Bail Act] in refusing bail.
- [28] However, I have examined the affidavit of DC 3079 James filed in the High Court opposing the bail application and it states that one eye witness is the brother of the appellant and the other two eye witnesses are his nieces. They are supposed to have seen the appellant having sex with one of the complainants. One of the complainants is said to have been asleep when the appellant was having sexual intercourse with her.
- [29] Needless to say that the incident the eye witnesses are supposed to have seen looks somewhat puzzling and baffling. One would not expect an accused to have engaged in rape in full view of witnesses leave aside them being his close relations. The eye witnesses apparently had not seen any resistance or even awareness on the part of the complainant with whom the appellant had allegedly engaged in sexual intercourse.
- [30] However, the affidavit of DC 3079 James shows that the appellant intends to reside at Nadera while the complaints are currently residing at Laucala Bay and Cunningham. The present residences of the eye witnesses are not clear. The appellant in his supplementary affidavit tendered to the High Court had stated that he would be residing with his family members at Nadera.
- [31] I am of the view that the risk of the appellant influencing the eye witnesses who are related to him, if he is released on bail, could be addressed by appropriate orders regarding his residence until the trial commences. The complainants appear to be living away from the usual residence of the appellant and any possible interference with them too could be arrested by suitable strict bail conditions.

- [32] In all the circumstances above discussed, I am of the view that there is merit in the first ground of appeal.

Second ground

*The learned Judge erred in law in failing to take into consideration the presumption of innocence until proven guilty.*

- [33] The trial Judge had considered specifically only section 19 of the Bail Act and the matters set out therein but said in paragraph 06 that

*‘Although he is presumed innocent until proven guilty beyond reasonable doubt in a court of law, in my view, it is in the public interest and the protection of the community that he be remanded in custody, until further orders of court.’*

- [34] Thus, it is clear that the trial Judge had been mindful of the presumption of innocence under section 14(2) (a) of the Constitution.

- [35] In **Khan v State** (supra) the Court of Appeal dealt with a similar ground as follows.

*‘[18] Ground 5 contends that the learned High Court judge failed to consider section 13(1) (h) of the Constitution that states that an accused has the right to be released on reasonable terms and conditions pending trial, unless the interests of justice otherwise require.*

*[19] It is clear that the right to bail is not an absolute right. The right is subject to the overarching principle of interests of justice. Similarly, the entitlement to bail provided by section 3(1) of the Bail Act is subject to the overarching principle of interests of justice. These provisions reflect the presumption that the court must be mindful of when depriving an accused of his or her personal liberty pending trial in the interests of justice.’*

- [36] In **State v Shankar** [2003] FJHC 50; HAM 14.2003 Justice Gates observed that an entitlement to bail does no more than reflect the principle of the presumption of innocence, which is also contained in the Constitution. However, a person may be deprived of personal liberty if he is reasonably suspected of having committed an offence. Therefore it is clear that whilst preserving the right of innocence of an

accused person he could be still deprived of his personal liberty pending trial (**Qio v State** [2015] FJCA 68; AAU0140.2014 (28 May 2015).

[37] Therefore, I do not think that there is merit in ground 2.

[38] In consideration of all the factual circumstances and matters of law discussed above, I am of the view that the appellant has made out a case for him to be released on bail. Accordingly, I would grant leave and allow the appeal.


**The Orders of the Court:**


(i) *Leave granted*

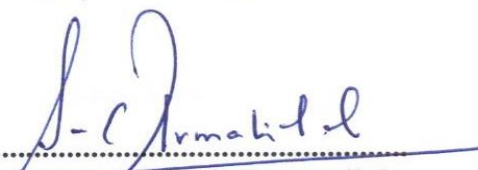
(ii) *Appeal allowed.*

(ii) *The Appellant is to be immediately brought before a judge of the High Court to fix the conditions upon which the appellant is to be released on bail.*



  
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**Hon. Mr. Justice W. Calanchini**  
**PRESIDENT, COURT OF APPEAL**

  
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**Hon. Mr. Justice E. Basnayake**  
**JUSTICE OF APPEAL**

  
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**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**