

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

**CRIMINAL APPEAL NO. AAU0067 of 2018**  
**[High Court Case No. HAM 142 of 2018]**

**BETWEEN** : **ROZALENE RAZIA KHAN**  
*Appellant*

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

**Coram** : **Calanchini P**  
**Gamalath JA**  
**Goundar JA**

**Counsel** : **Ms S Kunatuba for the Appellant**  
**Ms S Serukai for the Respondent**

**Date of Hearing** : **17 September 2018**

**Date of Judgment** : **29 March 2019**

**JUDGMENT**

**Calanchini P**

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

**Gamalath JA**

- [2] I have read the draft judgment of His Lordship Goundar JA and I am in agreement with the reasons contained therein and its decision.

**Goundar JA**

- [3] This is a timely application for leave to appeal against a decision of the High Court refusing bail pending trial to the appellant.
- [4] The appellant is charged with the murder of her 4-year old daughter contrary to section 237 of the Crimes Act. The offence was allegedly committed on 6 May 2018. The prosecution case is that the appellant strapped the victim to her body and jumped into a river in an attempt to commit suicide. The daughter drowned while the appellant survived. The appellant remained in custody on remand following her arrest on 6 May 2018.
- [5] On 11 June 2018, the appellant made a formal application for bail through her legal aid counsel. The prosecution objected to the granting of bail to the appellant on the grounds that the prosecution evidence against her was strong, that she posed a risk to the safety of her two other children because of parental custody dispute between her and her husband and that the presumption in favour of grant of bail was rebutted.
- [6] On 28 June 2018, the learned High Court judge after having considered the materials before him concluded that the appellant was a flight risk due to the seriousness of the charge and the strength of the prosecution evidence, that there were safety concerns for her and her children and that the presumption in favour of grant of bail was displaced.
- [7] The appellant appeals against the decision refusing bail on the following grounds:

1. That the Honourable Judge of the High Court erred in law and facts when he took into consideration in judgment a letter personally written by the applicant Ms Rozalene Razia Khan to the Court where she informed the Court that she wanted to “commit suicide and she did what she did under high depression”. This letter is highly prejudicial to Ms Rozalene Razia Khan and we submit that it should not have been used by the Court but returned to her counsel then, Legal Aid when she asked for it.
2. That the Honourable Judge erred in facts and in law when he did not take into account the presumption of innocence of the Appellant before refusing bail.
3. That the Honourable Judge of the High Court erred in facts and law when he took into account irrelevant considerations when he refused bail.
4. That the Honourable High Court Judge erred in law and facts when he did not undertake a proper analysis of the evidence s before the Court to realize that the objections to bail by the Respondent has no valid basis.
5. That the Honourable High Court Judge erred in law when he did not consider Ms Rozalene Razia Khan’s right under the Constitution 2013. Section 13(1)(h) of the Constitution 2013 which states that:

*“Every person who is arrested or detained has the right to be released on reasonable terms and conditions, pending a charge or trial, unless the interest of justice otherwise require”.*

6. That the Honourable Judge of the High Court erred in facts and law when he considered the Ms Rozalene Razia Khan id a “flight risk and a danger to her herself and the safety of her two older

children”. Therefore, he agreed that the presumption of granting bail is displaced.

7. That the Honourable High Court Judge erred in law when he did not consider section 3(1) of the Bail Act 2002 which states that every person has the right to bail unless it is not in the interest of justice to do so. Under section 3(3), there is a presumption in favour of granting a person bail... (emphasis is mine)
8. That the Honourable Judge erred in facts and law when he considered Ms Rozalene Razia Khan a flight risk based on the fact that her sister based in Nadi whom she had not spoken or visited for the last 5 years was seen visiting her while she was in custody.
9. That the Honourable Judge erred in facts and law when he did not take into consideration that the grandparents whom the elder children are staying with now are Ms Rozalene Razia Khan’s parents, her brother and sister in law not the family of the husband Mr Khan. They are prepared to provide surety as well as supervision for their daughter and sister in the event bail is approved.

[8] The decision to grant or refuse bail to an accused involves judicial exercise of discretion. An appellate court will interfere with the judicial exercise of discretion in relation to bail only if there is an error of principle or fact (*R v Payne [Burrett’s Case]* [2003] 3 NZLR 638 (CA)).

[9] Grounds one and two were argued together. Counsel for the appellant submits that the learned High Court judge wrongly considered a letter written by the appellant

incriminating herself to the charged offence to make a determination that the evidence against her was strong. It was further submitted that the appellant was presumed to be innocent and that the finding that the evidence against her was strong when no formal evidence was led breached the principle of presumption of innocence.

[10] In his ruling, the learned High Court judge referred to the fact that the appellant had written a letter to the High Court in which she claimed that 'she wanted to commit suicide and she did whatever she did under high depression'. When the appellant filed her affidavit in response to the State's affidavit opposing bail, she tried to withdraw that statement saying it was made without legal advice.

[11] In his ruling the learned High Court judge after making a brief reference to the appellant's statement that she was suicidal and that she acted under a state of depression did not refer to the letter or its contents any further. There is no merit in the submission that the learned High Court judge determined that the evidence against the appellant was strong based on the correspondence that was sent to the High Court by her in person. The statement that the appellant made in that correspondence in any event was not completely incriminating of her. The statement also provides for a potential defence of diminished responsibility provided that there is medical evidence to back up her claim that she acted under a state of a mental condition reducing her culpability from murder to manslaughter. It is not an error to refer to a potential defence when considering whether or not to grant an accused bail pending trial.

[12] The prosecution opposed granting of bail saying that there was very strong evidence against the appellant. The prosecution relied on the affidavit of WDC Sisilia who had deposed at paragraph 23 as follows:

*That there is very strong evidence in this case, including, the Post Mortem report (which was received on 14/06/18). The alleged admissions in the caution*

*interview and direct evidence of witnesses who were present at the scene at the time of alleged offence.*

[13] It is clear that the learned High Court judge came to the conclusion that the appellant was facing potentially strong prosecution case based on the above evidence of WDC Sisilia. There is no requirement to lead the incriminating evidence for bail determination. It is sufficient that the potential incriminating evidence is presented in an affidavit for the court to determine the strength of the prosecution case. If the prosecution case is potentially strong, the risk of the accused absconding bail is higher. There is no error in the learned High Court judge's conclusion that the prosecution evidence was strong making the appellant a flight risk.

[14] Although the learned High Court judge did not expressly refer to the presumption of innocence, there is nothing in the ruling to suggest that the learned High Court judge did not consider that the appellant was presumed to be innocent in concluding that she was a flight risk due to the strong prosecution case against her.

[15] Ground 3 is rather confusing. It alleges that the learned High Court judge took into account irrelevant considerations, while in the submission counsel for the appellant states that the learned High Court judge should not have found anything sinister arising from the appellant's relationship with her sister in Nadi. The impugned paragraph of the ruling is [5]:

*It was submitted during the bail hearing that the applicant did not have contact with her sister who lives in Nadi for the last 5 years. But when it was pointed out by the respondent that his sister was seen visiting the applicant while in custody, it was then submitted on behalf of the applicant that what was meant initially is that the applicant had not visited that sister for the last 5 years.*

[16] While the relevance of the appellant's relationship with her sister for bail determination is not clear, there is nothing in the ruling to suggest that the learned High Court judge based

his decision not to grant bail to the appellant because she did not get on well with her sister. The learned High Court judge did not grant bail to the appellant because the offence that the appellant was charged with was serious, that the appellant was a flight risk due to the strong prosecution case against her and that there were safety concerns for her and her other living children.

[17] Ground 4 was argued on the same submission that was relied upon for grounds one and two. The ground has no merit.

[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. The interests of justice in the present were to ensure that the appellant who is charged with the murder of her child in the circumstances of domestic violence is tried in a court of law and that while the trial is pending her other living children are safe.

[20] Ground 6 alleges that there was no basis to conclude that the appellant posed any risk to the safety of her two living children. The only basis that the prosecution claimed that the appellant posed a risk to the safety of her living children was because she was accused of domestic violence [paragraphs 24-26 of WDC Sisilia's affidavit].

[21] Section 3(1) of the Domestic Violence Act states that domestic violence in relation to any person means violence against that person (the victim) committed, directed or undertaken by a person (the perpetrator) with whom the victim is, or has been, in a family or

domestic relationship. It is not in dispute that the deceased is the biological daughter of the appellant. The allegation of murder against the appellant falls within the definition of domestic violence. Section 3(4) of the Bail Act states that the presumption in favour of grant of bail is displaced if the accused is charged with a domestic violence offence.

[22] In his ruling the learned High Court judge did not make any express finding that the appellant posed a risk to the safety of her living children. The learned High Court judge in paragraph 6 of his ruling expressed his concerns regarding the safety of the appellant herself and her other children, saying the presumption in favour of grant of bail is displaced due to the alleged offence being domestic violence. The learned High Court judge took into account the flight risk factor together with the safety concerns to arrive at a conclusion that it was not appropriate to grant bail to the appellant. There is no error of law or fact in that conclusion.

[23] Ground 7 alleges that the learned High Court judge failed to consider that section 3(1) of the Bail Act provided for an entitlement to bail. There is no merit on this ground as the entitlement to bail is subject to the overarching principle of interests of justice, which the learned High Court judge considered to refuse bail to the appellant.

[24] Ground 8 was argued based on the submission relied upon for ground 3. There is no merit in the contention that the learned High Court judge determined that the appellant was a flight risk based on the fact that she did not get on well with her sister who resided in Nadi.

[25] Ground 9 alleges that the learned High Court judge failed to consider the proposed sureties of the appellant. There was no need to consider the proposed sureties because the learned High Court judge had concluded that the appellant was a flight risk based on the strength of the prosecution case against her and when taken together with the safety concerns, it was not in the interests of justice to grant bail.



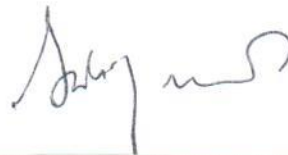
[26] The grounds of appeal have not been made out. I would grant leave but dismiss the appeal.

**Orders of the Court:**

1. Leave granted.
2. Appeal dismissed.



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



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**Hon. Justice Suhada Gamalath**  
**JUSTICE OF APPEAL**



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**Hon. Justice Daniel Goundar**  
**JUSTICE OF APPEAL**

**Solicitors:**

Law Solutions for the Appellant

Office of the Director of Public Prosecutions for the Respondent