

IN THE HIGH COURT OF FIJI
AT SUVA
[MISCELLANEOUS JURISDICTION]

CRIMINAL CASE NO: HAM. 063 of 2016

PANAPASA GANITA

V

STATE

Counsel : Ms. T. Kean for Applicant
Ms. K. Semisi for Respondent

Date of Hearing : 22nd April 2016

Date Ruling : 03rd May 2016

BAIL RULING

1. This is an application for bail pending trial. The applicant is charged with two count of rape contrary to section 207(2)(a) of the Crimes Decree 2009 (“Crimes Decree”) and five counts of sexual assault contrary to section 210(1) of the Crimes Decree. The offence of rape carries a maximum sentence of life imprisonment.
2. The complainant in the substantive case is 19 years old. According to the material available before this court, the applicant is complainant’s uncle. There is no dispute that the relationship between the complainant and the applicant is a domestic relationship according to the Domestic Violence Decree 2009 (“Domestic Violence Decree”).
3. Therefore, in terms of section 3(4)(c) of the Bail Act 2002 as amended by the Domestic Violence Decree (“Bail Act”), the presumption in favour of bail provided under section 3(3) of the Bail Act is displaced in this case.

4. Section 19 of the Bail Act 2002 was amended by the Domestic Violence Decree by inserting two subsections *inter alia*. They are as follows;

- section 19(1)(d) of the Bail Act;

“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) ...

(b) ...

(c) ...

(d) the accused person is charged with a domestic violence offence and the safety of a specially affected person is likely to be put at risk if bail is granted taking into account the conditions that could be applied if bail were granted.”

- section 19(2)(d) of the Bail Act;

“(d) as regards the safety of a specially affected person when the accused is charged with a domestic violence offence -

(i) the nature and history of alleged domestic violence by the accused in respect of the person against whom the alleged offence has been committed and any other specially affected person;

(ii) the views of the person against whom the alleged offence has been committed and any other specially affected person about the risk, if any, that the accused may pose to the safety and wellbeing of a specially affected person while on bail;

(iii) whether a domestic violence restraining order is in effect for the protection of a relevant specially affected person;

(iv) the likelihood of the accused person committing a further domestic violence offence while on bail.”

5. The effect of the presumption in favour of bail being displaced by virtue of section 3(4)(c) of the Bail Act on an application for bail could be discerned from the above provisions of section 19(1)(d). According to the plain reading of the said section, even when an applicant is charged with a domestic violence offence, unless the court is satisfied that the safety of the complainant is likely to be put at risk if bail is granted; bail must be granted. However, in my view, it is incumbent on an applicant in such a case to ensure that the provisions of section 19(2)(d) of the Bail Act are appropriately addressed

in the relevant application in order for that application to be successful. The factors highlighted under the said section 19(2)(d) are the essential factors a court should consider in forming an opinion whether or not bail should be granted in the absence of the presumption in favour of granting bail.

6. It is pertinent to note that section 18(1) of the Bail Act only provides how to structure a submission made against the presumption in favour of granting bail. The Bail Act does not stipulate the factors to be dealt with in a submission opposing bail where the presumption is displaced. Section 18(1) of the Bail Act reads;

"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."*

7. Considering the provisions of section 19(1)(d) and section 19(2)(d), I am of the view that, notwithstanding the provisions of section 18(1) of the Bail Act, it is important for the respondent in a case where the presumption in favour of bail is displaced in view of section 3(4)(c) of the Bail Act, to deal with the provisions of section 19(2)(d) of the Bail Act in the submissions opposing bail, if they are to properly discharge the duty in assisting court. The court will not be properly assisted by merely submitting that the presumption in favour of bail is displaced.
8. In support of this application, the applicant states that he has no record of absconding bail, he says he has been informed that the complainant has changed her residence and he wants to be released on bail to support his family. In paragraph 12 of his affidavit dated 31st March 2016, the applicant states that he was employed as a chef on a boat before he was arrested.
9. The respondent objects for bail stating that the applicant is charged with a serious offence, there is a strong case for the prosecution and that the presumption in favour of bail is displaced.
10. I find that the applicant has not sufficiently shown that the complainant's safety is not likely

to be put at risk by releasing him on bail. I note that the applicant has stated in his affidavit that he has been informed by his wife that the complainant has moved to Nadi. Counsel for the respondent disputed this information during the hearing and stated that the complainant is in Suva according to her instructions. I am anyway unable to rely on the truth of this information in the applicant's affidavit regarding complainant's residence as it amounts to hearsay.

11. According to his affidavit, the occupation applicant is versed with is being a chef on a boat. Considering the said fact together with the fact that the maximum penalty for the offence of rape is life imprisonment, there is a strong flight risk involved in this case. This factor makes the case worse for the applicant who is also not having the benefit of the presumption in favour of granting of bail.
12. In the light of the foregoing, I refuse this application for bail pending trial.



Vinsent S. Perera
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Applicant : Office of the Director of Legal Aid Commission, Suva