

**IN THE HIGH COURT OF FIJI AT LABASA**

In the matter of an application for bail  
pending trial.

**PETARIKI LESUMA**

**Applicant**

**CASE NO: HAM.046 of 2018**  
**[HAC 058/18]**

**Vs.**

**STATE**

**Respondent**

**Counsel** : Mr. A. Sen for the Applicant  
Ms. D. Kumar for the Respondent

**Hearing on** : 10<sup>th</sup> and 13<sup>th</sup> September 2018

**Ruling on** : 13<sup>th</sup> September 2018

**BAIL RULING**

1. This is the second application for bail pending trial. The applicant was charged with one count of rape contrary to section 207(1)(2)(a) of the Crimes Act 2009 ("Crimes Act") before the Magistrate Court and the substantive case is called today for the purpose of filing the Information.
2. The offence of rape carries a maximum sentence of life imprisonment.

3. Applicant's first bail application was refused by this court on 21/08/18. The reasons for the said decision are noted in the relevant case record as follows;

*"16 year old girl of the same village.*

*They are related.*

*His niece.*

*DVRO is extended until further notice and until further order of this court.*

*Bail application is refused.*

*The proximity of the victim (same village, related) . . . a high likelihood of interference."*

4. Given the above, it is manifestly clear that this court had made a finding that there is a relationship between the applicant and the prosecutrix that would fall within the definition of a domestic relationship under the Domestic Violence Act 2009 ("Domestic Violence Act"). In the circumstances, it is regrettable that Mr. Sen informed this court on 10/09/18 that there is no evidence before this court that there is a domestic relationship between the applicant and the prosecutrix and that this was raised as a new matter. He also submitted on that day that the prosecutrix is 18 years old.
5. An applicant applying for bail must disclose all relevant facts in the bail application. If the relationship between the applicant and the complainant is a domestic relationship, it should be disclosed in the bail application because the presumption in favour of granting of bail is displaced if that is the case. Such applications should also contain sufficient material for the court to form an opinion in line with section 19(1)(d) of the Bail Act 2002 as amended by the Domestic Violence Act ("Bail Act"). That is, sufficient material for the court to form an opinion that the safety of the complainant is not likely to be put at risk if bail is granted.
6. According to the material available before this court, the prosecutrix in the substantive case was 16 years old at the time of the alleged incident and the applicant is her uncle. In the response filed by the State, it is submitted that

according to the applicant's cautioned interview, the prosecutrix is the child of his older brother. The alleged incident had taken place while the applicant and the prosecutrix were living in the same house.

7. The offence allegedly committed by the applicant clearly amounts to a domestic violence offence in terms of the Domestic Violence Act and therefore, in terms of section 3(4)(c) of the Bail Act, the presumption in favour of bail provided under section 3(3) of the Bail Act is displaced in this case.
8. It is unfortunate that the State does not object for bail in this case on the basis that the applicant does not have previous convictions. The focus of a bail application where the applicant is alleged to have committed a domestic violence offence is the safety of the prosecutrix. In my view, in a case such as this where the presumption in favour of bail is displaced in view of the provisions of section 3(4)(c) of the Bail Act, the respondent should deal with the provisions of section 19(2)(d) of the Bail Act in their response to an application for bail and provide relevant material accordingly, if they are to properly discharge the duty in assisting the court.
9. Section 19(2)(d) of the Bail Act reads thus;
  - "(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;

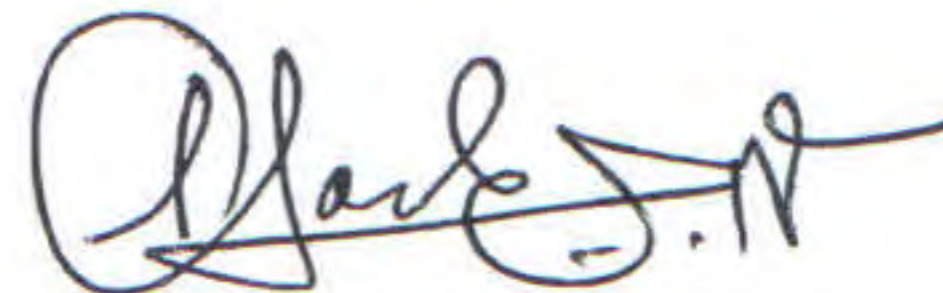
*(iv) the likelihood of the accused person committing a further domestic violence offence while on bail."*

10. It appears that this court in the first bail application had considered that the applicant and the prosecutrix are living in the same village. It is submitted on behalf of the applicant that the applicant's proposed place of residence is about 120km away from where the prosecutrix presently resides and this was not explained to court during the hearing of the previous application.
11. However, given the domestic relationship between the applicant and the prosecutrix and her age, I find that the likelihood of interference is not sufficiently mitigated even if the applicant is allowed to reside at the proposed address and I am of the view that the safety of the complainant is likely to be put at risk if the applicant is granted bail.
12. In the case of *State vs AV* (Criminal Case No 192/2008), Justice Goundar held that;

*"... By ratifying the convention, the State is obliged to take all appropriate legislative measures to protect children of this country from all forms of physical or mental violence, injury or abuse or exploitation or sexual abuse. The Convention also allows for judicial involvement to carry out the protective measures for children"*
13. The prosecutrix is still below the age of 18 years and therefore she is a child in terms of the provisions of the 2013 Constitution. The applicant is 42 years old. If found guilty, the applicant will be sentenced to a term of imprisonment within the range of 10 to 16 years. Given the circumstances of this case including the fact that the presumption in favour of granting of bail is displaced; I am inclined to form the view that it is not appropriate to grant bail to the applicant. The applicant had failed to place before this court any circumstances or special facts that would warrant the decision taken on the previous bail application to be reviewed.

14. This application is therefore refused.



  
Vinsent S. Perera  
JUDGE

**Solicitors:**

Maqbool and Company Solicitors, Labasa for the Applicant  
Office of the Director of Public Prosecutions for the State