

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**MISCELLANEOUS CASE NO: HAM 46 of 2020**

**ASHNEEL ASHIS CHANDRA**

**V**

**STATE**

**Counsel** : Mr. Jitendra Reddy with Mr. Sunil Gosai for the Applicant  
: Ms. Swastika Sharma for the Respondent

**Dates of Hearing** : 9 April 2020 and 27 April 2020

**Ruling** : 01 May 2020

***The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "MMS".***

**BAIL RULING**

1. This is an application for bail pending trial. The Applicant is the accused in HAC 70 of 2020.
2. As per the Information filed by the Director of Public Prosecutions ("DPP") in the substantive matter, the Applicant is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 ("Crimes Act"), one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act.
3. The full details of the Information reads as follows:

## COUNT ONE

### (Representative Count)

#### *Statement of Offence*

**RAPE**: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

#### *Particulars of Offence*

**ASHNEEL ASHIS CHANDRA**, between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of October 2017, at Suva, in the Central Division, penetrated the vagina of **MMS**, a child under the age of 13 years, with his finger.

## COUNT TWO

### (Representative Count)

#### *Statement of Offence*

**SEXUAL ASSAULT**: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

#### *Particulars of Offence*

**ASHNEEL ASHIS CHANDRA**, between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of October 2017, at Suva, in the Central Division, unlawfully and indecently assaulted **MMS**, by fondling her breast.

## COUNT THREE

#### *Statement of Offence*

**RAPE**: Contrary to Section 207 (1) and (2) (a) and (3) of Crimes Act 2009.

#### *Particulars of Offence*

**ASHNEEL ASHIS CHANDRA**, between the 1<sup>st</sup> day of November 2017 and the 31<sup>st</sup> day of November 2017, at Suva, in the Central Division, penetrated the vagina of **MMS**, a child under the age of 13 years, with his penis.

4. The State filed the Disclosures in the substantive matter on 13 March 2020; while the Information was filed on 27 March 2020. The Applicant is yet to take his plea.

5. This application was filed by way of a Notice of Motion for Bail, together with an Affidavit in support deposed to by the Applicant.
6. Therein, the Applicant deposes that he has been remanded in custody for this case since 12 February 2020. He is 27 years of age and is self-employed earning approximately \$250 to \$300 per week. He is married with one daughter, who is one year of age. He is said to be the sole bread winner of the family. Apart from his wife and daughter, he deposes that he is supporting his sickly mother, who is 59 years of age.
7. The Applicant further deposes that if granted bail he undertakes to reside at Lot 12, Nokonoko Road, Laucala Beach Estate, Suva, with his wife, daughter and mother. If granted bail the Applicant undertakes to report to the Nabua Police Station.
8. The Applicant has proposed his father-in-law, Anil Prasad, and uncle, Anthony Aziz Kumar, as sureties. Additional Affidavits of the two proposed sureties have also been filed, denoting their willingness to stand as sureties for the Applicant.
9. The Respondent filed the Affidavit of WDC 3602 Elina, Police Officer, based at the Valelevu Police Station, in opposition to this application for bail. WDC Elina who is the Investigating Officer in this case, strongly objects to the granting of bail to the Applicant.
10. WDC Elina deposes that the complainant in this matter is now 14 years of age and the incidents are alleged to have occurred since the year 2012, when the child was 7 years old. The Applicant is the child complainant's paternal uncle. Therefore, there is a domestic relationship between the Applicant and the complainant. The alleged incidents are said to have taken place, on a number of occasions, at the Applicant's house when the complainant was visiting the said house.
11. WDC Elina further deposes that the child complainant resides at Lot 10, Tagicakobau Road, Nausori and is schooling at Rishikul Sanatan College, Suva. The Applicant is said to be a Taxi Driver, usually operating around R B Patel Centrepont, Ratu Dovi Road, Suva, which is in close proximity to the school.

12. As such, if granted bail, there is a strong likelihood that the Applicant would interfere with the child complainant.
13. A further Affidavit has been filed in opposition to this application for bail by Dr. Monita Sharma, who is said to be the complainant's aunt. Dr. Sharma deposes that the complainant resides with her at Lot 10, Tagicakobau Road, Nausori. She had been taking care of the complainant since she was 2 years of age. The complainant addresses her as her mother. The Applicant is her cousin brother and the complainant's uncle.
14. Dr. Sharma further deposes that since the parties are related, they used to frequently attend family functions at the Applicant's residence. They have been going to the Applicant's house till this matter was reported to the Police. She deposes that now that the matter has been reported, the extended families in support of the Applicant have been bad-mouthing and interfering saying that this matter should not have been reported to the Police. Since the matter was reported to the Police, it is stated that the complainant has refused to go out of the house or go to school.
15. Since the Applicant resides at Lot 12, Nokonoko Road, Laucala Beach Estate, Suva, which is a short distance from the Rishikul Sanatan College, where the complainant is schooling, Dr. Sharma submits that the safety of the complainant will be threatened if the Applicant is released on bail.
16. During the hearing of this application, the Counsel for the Applicant submitted that the two Affidavits filed by the WDC Elina and Dr. Monita Sharma were defective, since the jurat of the said Affidavits were irregular. In the jurat it is only stated that the Affidavits were sworn before the Commissioner of Oaths. It is not stated therein that the contents of the Affidavits were first read over and explained to the deponents in their preferred language and having understood its meaning and effect that the deponents placed their signatures on the said Affidavits. Therefore, Counsel for the Applicant submitted that the said two Affidavits should be rejected.

17. In this regard, I refer to the Practice Direction No 1 of 2000 issued by the Chief Registrar, on 17 March 2000, dealing with Affidavits. For ease of reference, the Practice Direction is reproduced below:

**CHIEF REGISTRAR'S PRACTICE DIRECTION NO. 1 OF 2000 (17 MARCH 2000)**

**Affidavits**

*The making of affidavits is governed:*

- (i) In the High Court by Order 41 of the 1988 High Court Rules;*
- (ii) In the Magistrates Courts (and Small Claims Tribunals) by Order V Part III of the Magistrates Courts Rules (Cap 14).*

*When an affidavit is sworn, it is essential that the name of the Commissioner for Oaths be readily identifiable. The signature of the Commissioner should preferably be followed by a rubber-stamped endorsement giving the Commissioner's name and address. Alternatively, the Commissioner's name must be written below the signature in block capitals.*

*Affidavits the jurats of which do not comply with the above direction are not to be accepted in Court Registries from now on.*

18. Therefore, it is made clear from the above Practice Direction that the procedure to be followed with regard to the filing of Affidavits in the High Court, even in criminal proceedings, are governed by Order 41 of the High Court Rules 1988 (High Court Rules).
19. Order 41 of the High Court Rules comprises of 12 Rules. Rule 1 has detailed provisions dealing with the Form of Affidavits, while Rule 5 contains the provisions as to the Contents of Affidavits.
20. Order 41, Rule 3, deals with Affidavits by illiterate or blind person or person who does not understand English. The said Rule is reproduced below:

*“(1) Where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that –*

- (a) the affidavit was read in his presence to the deponent,*
- (b) the deponent seemed perfectly to understand it, and*
- (c) the deponent made his signature or mark in his presence;*

*and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.*

*(2) Where it appears to the person administering the oath that the deponent does not understand the English language, he must certify in the jurat that –*

- (a) the affidavit was read, explained and interpreted either by himself or through the medium of a sworn and named interpreter in his presence, to the deponent in a specified language with which the deponent was familiar,*
- (b) the deponent seemed perfectly to understand it, and*
- (c) the deponent made his signature or mark in his presence;*

*and the affidavit shall not be used in evidence without such a certificate.”*

21. It is apparent from Rule 3 that the necessity of having the full jurat is required only when it appears to the person administering the oath that the deponent is illiterate or blind or does not understand the English language.
22. In the instant case, it is clear that the deponents of the two Affidavits do not come under the said category. Therefore, it was not essential for the Commissioner For Oaths, who is the person administering the oath, to certify in the jurat that that the contents of the Affidavits were first read over and explained to the deponents in their preferred language and having understood its meaning and effect that the deponents placed their signatures on the said Affidavits.
23. For the said reasons, it is my view, that the two Affidavits filed by WDC Elina and Dr. Monita Sharma are not defective and that Court could rely on the contents of same.

24. In any event, Order 41, Rule 4 provides that: *“An affidavit may, with the leave of Court, be filed or used in evidence notwithstanding any irregularity in the form thereof”*.
25. The Applicant filed separate Affidavits in Reply to the Affidavits filed by WDC Elina and Dr. Monita Sharma.
26. In the Affidavit in Reply to the Affidavit filed by WDC Elina the Applicant denies that he is a Taxi Driver and deposes that he has never been one nor does he possess a Taxi License. He deposes that he works for a construction company in Nasese, Suva and that he goes straight to work from home and returns home straight after work. He states that he does not go anywhere near R B Patel Centrepoint at any time.
27. The Applicant further deposes that according to the Information filed against him, the offences had been committed between the year 2012 and November 2017. There has been no complaints against him since that day. All the incidents are alleged to have taken place at his residence and he states that he has a valid defence to the charges. The Applicant maintains that he is presumed innocent until he is proven guilty of the charges.
28. He undertakes that if granted bail he would not interfere with the complainant or any of her family members.
29. In the Affidavit in Reply to the Affidavit filed by Dr. Monita Sharma the Applicant denies that the extended families in support of him have been bad-mouthing and interfering saying that this matter should not have been reported to the Police. He states that none of his family members would ever do so. He submits that his mother is a heart patient and hardly goes out of the house and his wife has nothing to do with the complainant or her family, after this complaint had been made against him. He has also annexed to the Affidavit copies of his mother’s medical history to confirm that she is a heart patient.
30. The Applicant further deposes that he has been diagnosed by Dr. Monita Sharma to be suffering from Anxiety. Copies of the prescriptions and other test results which had been ordered by Dr. Sharma, have been annexed to the Affidavit.

31. The Counsel for the Applicant filed detailed Written Submissions making reference to several case authorities, which I have had the benefit of perusing.
32. During the hearing of this matter the Counsel for the Applicant submitted that the complaint against the Applicant was a belated complaint. The matter is said to have been reported in February 2020, whereas the alleged offences had taken place between January 2012 and November 2017.
33. The Counsel also emphasized that the Applicant is presumed innocent until he is found guilty.
34. During the hearing the Counsel for the Applicant submitted that since the State is objecting to the Applicant residing at his residence in Laucala Beach Estate, Suva, in the event of being granted bail, the Applicant undertakes to reside with his father-in-law, the first named surety in Lami if he is enlarged on bail.
35. In terms of Section 3(1) of the Bail Act No. 26 of 2002 ("Bail Act"), *"Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted."*
36. Section 3(3) of the Bail Act provides that: *"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."*
37. However, in terms of Section 3(4) of the Bail Act, as amended by the Domestic Violence Act No. 33 of 2009 ("Domestic Violence Act"), the presumption in favour of granting of bail is displaced in the following circumstances:
  - (a) *the person is seeking bail has previously breached a bail undertaking or bail condition; or*
  - (b) *the person has been convicted and has appealed against the conviction; or*
  - (c) *the person has been charged with a domestic violent offence.*



38. As such, in this case since there is a domestic relationship between the Applicant and the complainant, the presumption in favour of granting of bail is displaced.
39. In terms of Section 17 (2) of the Bail Act 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.
40. Section 19(1) of the Bail Act, as amended by the Domestic Violence Act, provides for grounds for the Court to refuse to grant bail. The sub section is reproduced below:

*“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;*
- (c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult; or*
- (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.”*

41. In forming the opinion required by subsection (1), section 19(2) of the Bail Act stipulates that Court must have regard to all the relevant circumstances, and in particular to the circumstances enumerated in the said sub section. In relation to section 19(1) (d), the relevant circumstances can be found in section 19(2) (d), which reads as follows:

*“(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."*

42. The primary objection taken up by the Respondent to the granting of bail is that there is a high likelihood that the Applicant may interfere with prosecution witnesses, including the complainant, who is his niece and a minor child. This Court cannot ignore this fact, even though the Applicant states that in the event of him being granted bail he undertakes to reside with his father-in-law in Lami. The chances of the Applicant interfering with the prosecution witnesses, who are all family members, still exists.

43. I agree that the presumption of innocence is a right guaranteed by the Constitution available to all accused persons. The presumption of innocence means that an accused person is presumed innocent. He does not have to prove anything. The burden lies with the prosecution to prove the case against the accused beyond reasonable doubt. However, this does not mean that the presumption of innocence alone should be considered by a Court of Law as a factor in granting bail to an accused person. In that event Court will have to grant bail to every person accused of an offence and who is seeking bail.

44. In this case the prosecution submits that they have a strong case against the Applicant. The charges filed against the Applicant relate to serious offences, which have been allegedly committed over a long period of time. The offence of Rape carries a maximum penalty of imprisonment for life. The tariff for Rape of a juvenile is between 11 years to 20 years imprisonment.
45. This Court is of the opinion that granting bail to the Applicant would endanger the public interest and make the protection of the community more difficult. The Applicant is charged with a domestic violence offence and the safety of the specially affected person (the complainant) is likely to be put at risk if bail is granted. Since the Applicant is charged with serious offences, there is a high likelihood that he would fail to appear in Court if granted bail.
46. Taking all the above factors into consideration, I refuse this application for bail pending trial and the application for bail is accordingly dismissed.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 1<sup>st</sup> Day of May 2020

**Solicitors for the Applicant : Jiten Reddy Lawyers, Barristers and Solicitors, Nakasi.**  
**Solicitors for the Respondent : Office of the Director of Public Prosecutions, Suva.**