

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Miscellaneous No. HAM 57/24

BETWEEN: **TEVITA DEVE SERU**

APPLICANT

AND: **STATE**

RESPONDENT

Appearances: **Mr S Drole for the Applicant**
Ms S Naibe for the Respondent

Hearing: **25th March 2024**

Ruling: **4th April 2024**

RULING

1. The applicant in this case is facing a charge of Rape contrary to section 207(1) and 2(a) of the Crimes Act 2009. The alleged incident reportedly took place on 10th January 2020 in Loloma, Vatukoula.
2. The applicant was initially released on bail in this matter. The applicant's bail condition was revoked by Justice Sharma on 9th February 2024 due to his repeated failure to comply with bail requirements on two separate occasions. It seems that the applicant failed to adequately explain his absence, resulting in the court's decision to revoke his bail.
3. On 4th March 2024, the applicant filed a motion and affidavit for bail, pursuant to sections 3, 17, 18 and 19 of the Bail Act 2002. The sworn affidavits of applicants spouse and two proposed sureties were filed in support of the motion.

4. In brief, the applicant's spouse deposed that they have two children, aged 10 and 8, and they live together in Loloma Settlement, Vatukoula. She was previously employed with Vatukoula Gold Mine Ltd but had to resign due to health reasons. The applicant was previously employed at Vatukoula Gold Mine, but is currently being held in custody. The counsel representing the applicant is facing difficulties in communicating with the applicant due to his current custody status. Her husband needs to be released on bail in order to properly prepare his case with his counsel. Both of them are currently without work, which is causing severe hardship on their family. The applicant, being a diver, intends to engage in diving activities to provide for their family's sustenance, should he be granted bail. They are currently behind on their rent payments. The applicant does not possess a passport and does not pose a flight risk. There is no conflict between her family and the complainant's family. She will ensure that the applicant attends to his court case until it is completed. She will assist and encourage her husband to comply with any bail conditions. She has secured two sureties namely Apisai Kunadoi (Miner Worker) and Alanieta Marama (Early Childhood Education School teacher).

5. Prosecution objected to the application for bail and relies on the affidavit of W/Cpl 4820 Loraini Bula, who is stationed at Vatukoula Police Station. I briefly summarize below what she deposed.

She stated that the applicant had violated his bail condition twice in this matter by failing to appear in court for over a year. The applicant is facing a serious offence, and it is clear that the public interest takes precedence over the applicant's personal interests. On 15th June 2022, the applicant did not appear, resulting in the issuance of a bench warrant for his arrest. The applicant then made another appearance on 26th January 2023, following a period of non-attendance for 7 months. The court accepted the applicant's excuse for his non-appearance, as he explained that his wife was ill. The applicant was subsequently granted bail and advised to provide his wife's medical report. On the next occasion, which was on 9th February 2023, the applicant did not appear and as a result, a bench warrant was issued once again. The applicant finally showed up on 9th February 2024, a whole year after being issued a bench warrant. The applicant provided an excuse about his wife's illness, but failed to provide any medical report to verify the same. She's of the opinion that if granted bail, it is unlikely that the applicant will appear in court again, given his track record of not showing up for over a year. There are concerns regarding the applicant's ability to adhere to bail conditions.

The explanation provided by the applicant's wife regarding their reliance on him is not exceptional, as many individuals in prison who have families experience similar circumstances. All pre trial matters have been resolved and the case is ready for trial. The trial date has been set for the 6th and 7th of June 2024, and it is uncertain whether the applicant will appear if granted bail. The applicants counsel can coordinate with the Correction Department to arrange a visit to the applicant in prison and discuss his case. Given the circumstances, it is highly probable that the applicant will not be present to answer the charge on trial date. Denying bail is necessary in the interest of justice.

6. Section 3 of the Bail Act 2002 states that every accused person is entitled to be released on bail, unless it is deemed against the interest of justice to grant bail. There is typically a presumption towards granting bail to an accused, although this right is not absolute and can be challenged.

In any given situation, the onus is on prosecution to refute the presumption by providing evidence that outweighs the probability of granting bail. Therefore, the granting of bail is not absolute and can be revoked under the following circumstances:

- i. If the applicant has violated a previous bail condition or undertaking;
- ii. If the applicant has been convicted and is appealing the conviction;
- iii. If the applicant is facing charges related to domestic violence.

7. The court in determining whether to grant or refuse bail must take into account sections 17, 18 and 19 of the Bail Act 2002.

According to section 17(1) & (2) the court must consider the time a suspect will have to spend in custody before trial if bail is refused and the primary consideration is the likelihood of accused appearing in court to answer the charges.

In relation to section 18(1), prosecution when opposing the granting of bail must address the following factors:

- i. Likelihood of the accused person surrendering to custody and appearing in court.
- ii. Interests of accused person.
- iii. Public interest and the protection of the community.

Further, according to section 19(1), a suspect must be granted bail unless the court is of the view that the following grounds exist:

- i. Accused person is unlikely to surrender to custody and appear in court to answer the charges.

- ii. Interests of accused person will not be served through the granting of bail.
 - iii. Granting bail to accused person would endanger the public interest or make the protection of the community more difficult.
8. In Isimeli Wakaniyasi v The State (2010) FJHC 20; HAM 120/2009 (29th January 2010), Justice Goundar made it clear that the presence of all three grounds is not necessary to justify the refusal of bail. The presence of any single ground is enough to deny bail.
9. The disposal of this matter has been delayed due to the absence of the applicant. The applicant, as previously stated, was initially on bail. His absence from court for a period of 1 year and 7 months has raised suspicions about him. Interestingly, the record indicates that Justice Sharma had reluctantly granted him bail on the first occasion (i.e. 26th January 2023) after he had absconded for 7 months. After evading authorities once more for an extended period of one year, that is when bail was completely revoked. The reason provided by the applicant for not showing up was regarded by the court as unsatisfactory and I tend to concur. During the bail hearing, the applicant's counsel presented a letter from Dr. Sivnay D Ram, dated 6th February 2023, as the only medical report regarding the applicant's spouse. It is evident from the letter that the applicant's wife had previously worked at Vatukoula Gold Mines Ltd and opted to resign in January 2021 due to health issues related to dizziness and PV bleeding associated with menopause. The report provided does not provide a definitive conclusion regarding the applicant's wife's health condition and her ability to work or engage in difficult activity. The letter appears to have been written in support of her application to access her retirement funds from Fiji National Provident Fund.
10. The primary factor to consider is the likelihood of having to appear in court to answer the allegations. However, the applicant's previous absconding conduct does not bode well for his likelihood of appearing to answer the charge at trial.
11. The applicants' family circumstances have been taken into account in relation to this application. The affidavit deposed suggests that the applicant has a family to care for, which is a common responsibility. There are numerous individuals in prison who have families to care for, yet they were denied bail in the interest of justice.

12. Furthermore, the argument that counsel is unable to communicate with the applicant and adequately prepare for the case due to the applicant being in custody is unfounded. It seems that counsel can easily coordinate with the Corrections Department to ensure that the applicant's rights are upheld. They will then schedule a convenient date and time for the parties to meet, discuss, and prepare for the trial. I'm confident that lawyers from the Legal Aid Commission and other private counsels have been adhering to the same practice and granted permission to meet their clients in prison. I don't anticipate any obstacles that would prevent the applicant and his counsel from being treated similarly in this matter. The trial is scheduled for 2 months from now, giving the applicant and his counsel ample time to meet, discuss, and adequately prepare.
13. The applicant was previously given the benefit of the doubt when Justice Sharma reluctantly extended his bail on 26th January 2023, after he was on bench warrant for 7 months. The applicant failed to appreciate the privilege shown to him and absconded again for an additional year. The pre-trial matters in this case have already been resolved, and the trial is scheduled to begin on 6th and 7th June 2024, which is approximately two months from now. Considering the current circumstances as recorded, I am not convinced that the accused will adhere to his bail conditions, particularly in regards to appearing in court to answer the charge at trial.
14. In the interest of justice, the application for bail is refused and applicant to be remanded in custody until conclusion of trial.
15. I rule so accordingly.
16. Parties are at liberty to appeal.



A handwritten signature in blue ink, appearing to read 'Samuela D Qica', is written over a horizontal dotted line.

Samuela D Qica
Acting Puisne Judge