

IN THE COURT OF APPEAL, FIJI
(ON APPEAL FROM THE HIGH COURT)

Criminal Appeal No. AAU 074 of 2019
(Miscellaneous Case No. HAM 93 of 2019)

BETWEEN : **ATESHWAR PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Mr. Iqbal Khan for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **18 November 2019**

Date of Judgment : **28 November 2019**

JUDGMENT

Gamalath, JA

[1] The Appellant, Ateshwar Prasad, faces the following charges in the High Court, where his trial is due to commence on 9-December to 13 –December 2019, merely 10 days away from this ruling.

Rape under section 207 (1) (2) and (3).

- (i) Sexual Assault under section 210 (1) (a) and (2).
- (ii) Abduction of person under 18 years with intent to have carnal knowledge – under section 211(1).
- (iii) Wrongful confinement under section 286.

- [2] His endeavors to obtain bail from the High Court on three previous occasions had been unsuccessful. The first application for bail was refused on 5 September 2018, the second application for bail was refused on 12 February 2019 and the third application was refused on 12 June 2019.
- [3] He is presently seeking leave under section 21(3) of the Court of Appeal Act and Rules (Cap 12) ,challenging the last order that refused bail on the following grounds of appeal;
- "(i) that the learned trial judge erred in law and in fact in not directing/adequately and/or misdirecting himself on the laws as to change of circumstances that were presented by the appellant;*
 - (ii) that the learned trial judge erred in law and in fact in not taking into consideration the change of circumstances that were presented by the appellant;*
 - (iii) that the learned trial judge erred in law and in fact in not taking into consideration the appellants submissions and legal authorities that were presented by his Counsel;*
 - (iv) that the learned trial judge erred in law and in fact in not taking into consideration that the State's affidavit opposing bail did not challenge the appellant's affidavit in support of bail, sighting and giving full particulars as to change of circumstances (sic) ."*
- [4] The Counsel for the Appellant at the outset of his submissions stated that the thrust of his argument is that there have been change of circumstances between the second and the third bail applications. Therefore, the application for bail should be considered in the backdrop of the new circumstances and treated favorably. He places a great amount of emphasis on the availability of the medico–legal report of the victim, a new piece of evidence that had not been at the disposal of court while making the three bail

applications previously. According to his submissions the charges as preferred against the appellant cannot be sustained having regard to the medico-legal report, of the victim, which is tantamount to a change of circumstances.

- [5] The submission that the contents of the medico-legal report of the victim renders no support of the victim's version of the allegation is purely a matter of evidence to be determined, not at this stage, but at the trial proper. It is trite law that the expert evidence such as medical evidence offers none other than evidence of opinion which is not a sine qua non for proving a charge as the one that the appellant is confronted with.
- [6] Apart from what has already been stated above, at this stage of the hearing of the appeal pending trial, we are not in a position to make an evaluation about the weight to be attached to any evidence with a view of determining whether there is any change in the circumstances that is possible to be construed for the purpose of considering the grant of bail. In any bail hearing the main question is whether the accused should be released from custody pending trial. Any evaluation of the strength of the case for the prosecution based on the acceptance of the prosecution case is a matter that should be decided at the trial stage.
- [7] In his Ruling, Goundar J, has the following to state on the facts of the case which I am unable to overlook at this stage for its relevancy and currency to this application;

[11] "While the Accused has family and community ties in Fiji, the circumstances and nature of the offences are very serious. At this stage, I do not have to be convinced of the truth of the allegations. The police statements of the complainant and other witnesses are in the disclosures. The prosecution case is that the Accused tricked the child complainant to accompany him to his home and then raped her at a knife point. The child was found half naked and in a distressed condition with the Accused alone in his home by two witnesses. The Accused himself was found completely naked with the child complainant when the two witnesses confronted him. One of the witnesses is the sister of the complainant. She herself is 16 years old and

was in a relationship with the Accused at the material time. She allegedly warned the Accused that she was going to report the matter to the police, and she did in fact report the matter to the police soon thereafter. The child complainant was medically examined on the same day. There is some medical evidence to support the allegation of sexual abuse.

[12] The circumstances of the Accused's arrest are in dispute. In his affidavit, the Accused gave an impression that when he came to know that the police was looking for him he voluntarily turned himself in. According to WDC Silivia's affidavit, the Accused after evading police for two days was arrested on 22 July 2018 after the vehicle he was travelling in was intercepted by the police at the Queens Highway. I find it is more probable that the Accused was arrested by the police after he had evaded them for two days. The prosecution case is that the Accused had reasons to evade police as the complainant's sister had warned him off after the complainant was rescued from his home by her and another witness.

[13] All things considered, on the material before me it seems that the prosecution has a strong potential case against the Accused. I have no doubt that he must realize this and one cannot ignore at least the possibility that faced with a serious charge with serious consequences on conviction that the temptation not to answer to his bail at trial would be nothing short of overwhelming. I am also mindful that rape is punishable by life imprisonment. If the Accused is convicted, he is potentially looking at a long prison sentence. Although the Accused promises otherwise in his affidavit, given that the key witnesses are from the same community as the Accused and that the complainant and her sister are vulnerable witnesses due to their young age, the Accused might interfere with them if he is released on bail. I am satisfied that it is not in the interests of justice to grant bail."

- [8] In support of his application before us, the Counsel urged that the appellant's release on bail would facilitate his efforts to obtain proper legal advice for the trial. This, the Counsel urged, includes a 'locus in quo', visit to the scene of crime as well. In relation to this matter, the Counsel agrees that he has not yet sought the permission required from the prison's administration through whom the Counsel could obtain the necessary

facilities to have consultation with the clients who are inmates. As for the visit to the scene of crime, I have informed him that there are many legal guidance, well set in law especially in the common law area, and to seek the intervention of the appropriate judicial body at the correct time, so that he could reach his goals through that process.

[9] In his refusal to grant bail, on 12 June 2019, the learned High Court Judge had stated that the appellant had deposed to false and misleading information. This is a serious finding by a Hon. Learned High Court Judge, which I find difficult to overlook at this juncture. Goundar J, had stated that the appellant made attempts to evade arrest and that he is capable of exerting certain influence on the witnesses for the prosecution. I do not find any material submitted to us to address these serious concerns expressed by the Honorable High Court Judges and further the medico-legal report of the victim upon which the appellant is presently relying has not been made available for our perusal.

[10] In the circumstances, I am not inclined to grant bail pending trial to the appellant.

Prematilaka, JA

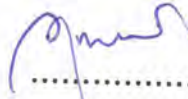
[11] I have read in draft the judgment of Gamalath, JA and agree with reasons and conclusions herein.

Bandara, JA

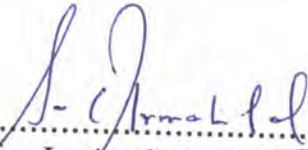
[12] I agree with reasoning and conclusions reached by Gamalath, JA.

Order of the Court:

Leave is refused.



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Hon. Justice S. Gamalath
JUSTICE OF APPEAL



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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL



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Hon. Justice N. Bandara
JUSTICE OF APPEAL