

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 128 OF 2015

BETWEEN : **APOROSA NACEWA**

Applicant

AND : **STATE**

Respondent

Counsel : **Ms L. Tabuakuro for Applicant**
Mr. S. Babitu for Respondent

Date of Hearing : **14th August 2015**

Date of Ruling : **17th August 2015**

BAIL RULING

1. The applicant, charged with the offence of Rape contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009, has filed this bail application seeking bail.
2. This is the first bail application since he was remanded by the Residence Magistrate of Nadi on 16th April, 2015.
3. The State has filed its response, supported by an affidavit of DC 3379 Nitesh, and seeks to rebut the presumption in favour of bail on the grounds stated therein.
4. In the bail application, the Applicant seeks bail on the following grounds;
 - a. He has a right to be released on bail pending trial under the Bail Act.
 - b. Presumption of innocence and presumption in favour of bail under the Bail Act are in his favour.
 - c. He is the sole bread winner of the family.
 - d. He works as a Portable Saw Operator under a clan based Co-operative and, due to his non availability, business has come to a standstill.

5. The State, dealing with the grounds stated in Section 18 (1) of the Bail Act, seeks to displace the presumption in favour of bail. Affidavit of DC Nitesh is based on the following grounds;
 - a. Charge against the applicant is serious and entails severe punishment, if found guilty.
 - b. Applicant is alleged to have committed the offence against his distance niece who is mildly intellectually impaired. There is a domestic violence relationship.
 - c. Strong likelihood of interference with State witnesses.
 - d. Case against the applicant is strong and likelihood of not appearing in court to face trial is high, if granted bail.
6. The presumption in Section 3 (3) of the Bail Act in favour of granting of bail can be displaced when there are valid grounds for detention. When there is a risk of domestic violence, presumption is displaced. Now the burden is on the Applicant to satisfy court that there will be no violence if he is granted bail.
7. According to Section 3 (1) of the bail Act, every accused has a right to be released on bail unless it is not in the interests of justice that bail should be granted.
8. The right to bail guaranteed to an accused under the Bail Act is conditional upon the primary consideration of interest of justice.

I now venture into consider each of the criteria in Subsection 18(1) of the Bail Act.

Likelihood of the accused person appearing in court to answer the charge laid against him,

9. According to Section 17 (1) 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 charge laid against him.
10. As per the affidavit filed by the State, the applicant has no previous convictions, pending cases or previous violations of bail conditions.
11. The charge against the Applicant in the present case is serious and carries a severe punishment, if found guilty. However, seriousness of the charge alone cannot be a good justification to refuse bail. In **Tak Sang Hao v The State** (2001) FJHC 15L; HAM 003d..2001, Justice Shameem stated that even though the seriousness of the offence is relevant but not the predominant factor.

12. According to the affidavit filed by the State, the Prosecution case is strong. State is relying on the Statement of the victim recorded during investigation and circumstantial evidence to support the prosecution's version. Since the charge is yet to be proved in the rape case, the applicant is presumed innocent until proven guilty.
13. The applicant has no history of violating bail conditions.
14. Having considered the above, I am of the view that there is no strong likelihood of the accused not appearing in court if granted bail.

As regards the interests of the accused person;


15. The Applicant states that:
 - a. He is the sole bread winner of the family.
 - b. He works as a Portable Saw Operator under a clan based Co-operative and due to his non availability, business has come to a standstill.
He has filed documents to prove he has expertise in portable saw milling.
16. On perusal of the substantive file, I find that the applicant has been in remand for nearly four months since April 2015. Trial date has not yet been fixed. When deciding whether to grant bail to an accused person, the court must take into account the time the person may have to spend in custody before trial if bail is not granted. [Section 17(1)]
17. Interests of the Applicant and the right to a fair trial will badly be affected if bail is not granted.

As regards the public interest and the protection of the community,

18. The Applicant has no history of violating bail conditions.
19. There is no a high risk of reoffending, if granted bail.
20. Although there is a domestic relationship, according to the address Victim has given to Police, she is residing in Nawaka while the Applicant is residing in Nausori Highland. Any possible interference with victim and witnesses could be avoided by imposing strict bail conditions.
21. Hence, refusal of bail would not substantially benefit the interests of the public. Keeping the Applicant for a long time without trial is not proportionate to the object to be achieved.

22. I hold that the presumption in favour of granting bail is not displaced. The application for bail pending trial is granted.
23. I order that the Applicant be released on following bail conditions;
1. Entering into a Personal Bail bond for FJD 1000
 2. Furnishing Surety Bail bond for FJD 1000 with two sureties including applicant's father.
 3. Not to reoffend.
 4. Not to interfere with the victim and State witnesses.
 5. Not to visit victim's house or her relative in Nawaka, Nadi.
 6. Reporting to Namulomulo Police Post on every Saturday between 8 a.m. and 4 p.m.




Aruna Aluthge
Judge

Solicitors: K LAW Chamber & Partners for Applicant
Office of the Director of Public Prosecutions for Respondent