

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

Criminal Miscellaneous Case No. HAM 321 of 2018

[High Court Criminal Case No. HAC 381 of 2018]

BETWEEN : DAVID ALI

AND : STATE

Counsel : Mr K. Chang for the Accused  
Ms M. Chowdhury for the State

Date of Hearing : 04 December 2018

Date of Ruling : 06 December 2018

RULING

1. The Accused filed a notice of motion through the Legal Aid Commission on 02 November 2018 seeking bail pending trial. He is charged with one count of rape contrary to section 207(1)(2)(b) and (3) of the Crimes Act. The Accused has been in remand custody since 10 October 2018.
2. The Prosecution case is that while the Accused was employed as a handyman at the Kids First Pre-school, he allegedly inserted his fingers into the vagina of a 4-year-old

child at the pre-school. The alleged offence has taken place somewhere in late August 2018.

3. I have considered the affidavit tendered by the Accused along with the notice of motion. He has stated the following:
  - a. He is 38 years old
  - b. He has been in remand custody since 9 October 2018
  - c. The alleged offence is not a domestic violence offence
  - d. He has no pending cases or previous convictions
  - e. He has no record of absconding bail
  - f. He is the sole breadwinner
  - g. He will be employed by his sureties in Lami, Pacific Harbour or Laucala Bay
  - h. That the victim resides in Sigatoka and the Accused resides far away from Sigatoka
  - i. He will abide by any bail condition
4. The Prosecution concedes that the Accused has no history of breaching bail conditions or of any criminal records. Further it is confirmed that there are no admissions in his cautioned interview. However, the Prosecution submits that the Accused's proposed address and the victim's residential address are of close proximity and denies that the complainant resides in Sigatoka.
5. Section 3(1) of the Bail Act provides that every person has a right to be released on bail unless it is not in the interest of justice that bail should not be granted. Further Section 3(3) of the Bail Act states that there is a presumption in favour of the granting of bail to a person.
6. However, the presumption is rebuttable and the Bail Act provides for instances where the presumption is displaced as per Section 3(4) in any of the following circumstances;
  - a) The person seeking bail has previously breached a bail undertaking or bail condition;

- b) The person has been convicted and has appealed against the conviction;  
or
- c) The person has been charged with a domestic violence offence.

7. In considering bail the court must also take into account the time that the accused person may have to spend in custody before trial if bail is not granted. Section 17(2) of the Act provides that the primary consideration in deciding whether to grant bail is likelihood of the accused person appearing in court to answer the charges laid against him or her.
8. Section 19 of the Bail Act states that an accused person must be granted bail unless the court is of the opinion that;
  - 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 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.
9. According to His Lordship Justice Goundar in **Isimeli Wakaniyasi v The State** (2010) FJHC 20; HAM 120/2009 (29th January 2010) existence of any one ground is sufficient to refuse bail. In light of the above discussed provisions in the Bail Act I will now consider the material placed before this court in relation to the bail application made on behalf of the Accused.
10. One of the main objections of the Prosecution is that the possible risk of the Accused not surrendering to custody given the seriousness of the offence which attracts a sentence with a tariff of 11 to 20 years. Secondly, the Prosecution submits that the proposed sureties are the owners of the pre-school where the alleged incident occurred and there is an element of public interest involved even if the Accused is employed elsewhere under the same masters. The Prosecution also alleges that there

is a risk of interference with the complainant and the other witnesses given the close proximity of the residential addresses.

11. There is no contention that the Accused is innocent until proven guilty. The charge against the Accused is still an allegation and the Prosecution is yet to produce evidence against the Accused. However, for the purposes of bail the court must look into the other aspects enunciated in the Bail Act to consider bail. As it was earlier stated the primary consideration would be to determine the likelihood of the Accused appearing in court to answer the charge laid against him.
12. Apparently, this case would attract potentially a long term custodial sentence if the Accused is convicted. I am satisfied that there is a possibility that the Accused would be tempted to abscond bail given the serious consequences on conviction. Further I am satisfied that, the fact that the Accused to be employed by the owners of the same pre-school, although in a different location and the proximity of the residences of the parties, could pave the way for possible interference with state witnesses if the Accused is released on bail.
13. I am mindful of the fact that the court has to consider the time that he will be spending in custody pending trial. This is a case which would receive priority over the other matters due to the nature of the offence and the age of the victim. Given the manner in which the current trial listings are managed in the High Court of Suva, the chances are high that this case will be fixed for hearing within the first half of next year. Therefore, I do not have any reason to believe that the Accused will have to spend a prolonged period in custody pending trial.
14. In the circumstances I am satisfied that it is not in the interest of justice to grant bail in this matter. Bail is refused.



A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Rangajeeva Wimalasena

**Acting Judge**