

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

Criminal Miscellaneous Case No. HAM 227 of 2018
[High Court Criminal Case No. HAC 311 of 2018]

BETWEEN : **ATESHWAR PRASAD**

AND : **STATE**

Counsel : **Mr G O'Driscoll for the Accused**
Ms K Semisi for the State

Date of Hearing : **16 & 28 August 2018**
Date of Ruling : **5 September 2018**

RULING

- [1] The Accused seeks bail pending trial. He is charged with one count each of rape, sexual assault, abduction and unlawful confinement. The offences were allegedly committed on 21 July 2018 at Navua. The complainant is a 12-year old child. Her 16-year old sister was allegedly in a relationship with the Accused at the time of the alleged offending.
- [2] The Accused was arrested and interviewed under caution on 23 July 2018. He denied the allegations made against him by the complainant. On 25 July 2018, he was charged and produced in the Magistrates' Court. He was remanded in custody and the case was transferred to the High Court for trial.

- [3] The Director of Public Prosecutions filed the Information on 28 August 2018. The Accused has pleaded not guilty to the charges.
- [4] The application for bail is supported by an affidavit from the Accused. The State opposes the application. The State's response is contained in an affidavit from WDC Silvia. The Accused has filed a further affidavit replying to WDC Silvia's affidavit. Further, the Court had the benefit of the disclosures filed by the State to determine this application for bail.
- [5] In *Seru v State* [2015] FJCA 30; AAU0152.2014 (27 February 2015), the Court of Appeal said at [12] that when considering an issue relating to bail, there is no requirement for formal evidence to be given and that a court may rely on written hearsay evidence provided it is properly evaluated.
- [6] The Bail Act 2002 (the Act) codifies much of the law relating to bail. Part II of the Act contains provisions of general application. The Act provides for two presumptions. An accused has an entitlement to bail (s 3(1)). This does no more than reflect the principle of the presumption of innocence, which is also stated in the Constitution. The entitlement will fail if it is not in the interests of justice that bail should be granted. Secondly, there is a presumption in favour of the granting of bail (s 3(3)). However, that presumption is rebuttable if it can be shown that the accused has previously breached a bail undertaking or bail condition, or been convicted and has appealed against the conviction (s 3(4)).
- [7] At the hearing of this application, there was an argument advanced by the State that the Accused had breached a bail condition in an unrelated case pending before the Magistrates' Court. Unfortunately, the State has not provided this Court with sufficient information to make a determination that the Accused had previously breached a bail undertaking or a condition. I make no such finding.

- [8] Section 17(2) of the Act states that the primary consideration in determining whether to grant bail is the likelihood of the accused appearing in court to answer the charge laid against him or her. The Court must also take into account the time the accused may have to spend in custody before trial if bail is not granted. The current practice of this Court is to hear the trial of an accused person who has been refused bail within 12 months from the date of arraignment. So if bail is not granted to the Accused the time in custody while in remand will be about 12 months.
- [9] Although the primary consideration in determining whether to grant bail is the likelihood of the accused person appearing in court to answer the charge (s 17(2), the court may refuse bail if the interests of the accused person will not be served through the granting of bail or the granting of bail would endanger the public interest or make the protection of the community more difficult (19(1)).
- [10] The Accused is 40 years and a Fiji citizen. He was managing the Pacific Energy Gas Station at Navua before his arrest. He has five previous convictions – 4 are spent and 1 is relevant. His last conviction was in 2010 for common assault. The Accused has offered to post \$2000 cash bail and proposed a shop manager and a public service vehicle driver who are willing to stand surety for him. He seeks bail so that he can continue to work to financially support his adult daughter and care for his sickly mother.
- [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 Silvia'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.

[14] Bail is refused. The Accused will remain in custody on remand pending trial. A priority trial date will be assigned to this case.



A handwritten signature in blue ink, appearing to be "D. Goundar", written over a horizontal line.

.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Messrs O'Driscoll & Co. for the Accused
Director of Public Prosecution for the State