

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

Criminal Miscellaneous Case No. HAM 19 of 2019
[High Court Criminal Case No. HAC 008 of 2019]

BETWEEN : ROBERT WILLIAM STOMAN

AND : STATE

Counsel : MS V. Patel for the Applicant
Ms Navia for the State

Date of Hearing : 22 February 2019

Date of Ruling : 14 March 2019

RULING

1. The Applicant seeks bail pending trial. A notice of motion was filed on behalf of the Applicant on 07 February 2019 seeking that the Applicant be released on bail, upon conditions. The Applicant was initially charged in the Nadi Magistrate's Court with one count of indecent assault contrary to section 212(1) of Crimes Act, one count of sexual assault contrary to section 210(1) of Crimes Act, one count of rape contrary to section 207(2)(b) of Crimes Act and another count of traffic in obscene publication contrary to section 377(1)(a)(b)(i) of Crimes Act.

2. The Applicant is a 73 years old Australian citizen. He claims that he was arrested by the Police on 9 January 2019 and was produced before the Nadi Magistrate's Court on 14 January 2019. He was remanded in custody by the Naid Magistrate and the case was thereafter transferred to the High Court.
3. The Prosecution case is that the victim is a 6 years old child and the alleged offences were committed when the Applicant was staying at the victim's house. The Applicant has deposed in his affidavit that he has visited Fiji in a number of occasions and he was staying with the victim's family since May 2018 upon the invitation of the victim's family.
4. I have considered the affidavit tendered by the Applicant along with the notice of motion. He has stated the following, among other things:
 - a. There is no certainty when the trial will take place
 - b. He takes various medications and need to make contact with his doctor in Australia for further supplies
 - c. He needs to take care of his personal and financial affairs and to consult with relevant authorities and with his solicitors to prepare his defence
 - d. His son is currently in Fiji arranging accommodation for him in the event he is granted bail
 - e. He is willing to surrender the passport and adhere to any bail conditions
 - f. He has co-operated with police and will present himself in court
5. The State opposes bail based on the grounds outlined by the investigating officer in his affidavit filed in response to the bail application.
6. 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 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.

7. Section 17(2) of the Act provides that the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him or her.
8. Section 19(1) 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. In **Wakaniyasi v The State** (2010) FJHC 20; HAM 120/2009 (29th January 2010) Justice Goundar observed that the existence of any one ground is sufficient to refuse bail.
10. Further section 19(2) of the Bail Act sets out the factors that the court must have regard to in forming an opinion regarding 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 Applicant.
11. The State submits that they have a strong case against the Applicant. They will rely on the evidence of the victim and the medical reports. The charge against the Applicant is still an allegation and the Prosecution is yet to produce evidence against him. However, for the purposes of bail the court must look into the relevant aspects enunciated in the Bail Act.
12. The State submits that the Applicant is charged with serious offences and if found guilty he is likely to face severe imprisonment ranging between 11 years to 20 years. Therefore, the State argues that given the strength of the Prosecution case and the likely penalty the Applicant is unlikely to appear in court.

13. 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. The Applicant submits that he will surrender his passport and will present himself in court.

14. Undoubtedly, the Applicant is facing very serious allegations and if convicted this case would potentially attract severe punishments. Moreover, this court has to be mindful of the fact that the Applicant is a foreign national. He does not have any social or community ties in Fiji. In a bail determination involving a foreign national Justice Madigan noted the following in *Xhemali v State* [2011] FJHC 148;

“The applicant is a US citizen and he has never been exposed to the lifestyle and culture of the Fijian people. He will of course for some time be alienated and homesick. That fact together with the certain prospect of a long term of imprisonment should he be convicted means that there is every likelihood that he will not appear for trial.”

15. Given the nature and the seriousness of the offences and the strength of the Prosecution case, I am satisfied that the chances are high for the Applicant to be tempted to abscond bail.

16. Further the Applicant has stated that his son has arrived in Fiji and currently arranging accommodation for him in Fiji. This is further confirmed by the proposed sureties in their affidavits by stating that the Applicant will stay in one of the hotels in Nadi. Justice Madigan commented on similar accommodation arrangements for a foreign national in *Xhemali v State* (supra) as follows;

“He plans to stay in a hotel in our prime tourist area. The vacillating ramifications of such residence are troubling. The accommodation is unable to be easily monitored; the funds to pay for it are not guaranteed; he may fall prey to the louche elements inevitably found in a tourism milieu. Hotel accommodation paid for from afar is not appropriate accommodation for an accused awaiting trial....”

17. In any event, I have considered the interests of the Applicant as well. He has stated that he takes various medications and need to make contact with his doctor in Australia for further supplies. I have perused the copy of his medical history dated 18 January 2019. It has a list of medications that the Applicant is currently on, namely Aspirin, Crestor, Nexium, Omega and Sevikar HCT. However, it was not confirmed that those medications cannot be supplied at the remand facility or those medicines are not available in Fiji.
18. Further it was submitted that he needs to consult with his solicitors to prepare for his defence. The Applicant is already represented by a solicitor. I do not see any difficulty to prepare for his case in absence of any evidence to confirm that there is any difficulty in giving instructions to his solicitor. The remand facilities cater to such needs when requested.
19. The Applicant proposed two sureties to secure his attendance in court. They tendered affidavits, for the court to verify the suitability to accept them as sureties. In *State v Petridis* [2018] FJHC 273; HAA013.2018 (12 April 2018), where a foreign national was involved, Justice Goundar stated that it is the court's obligation to determine whether a proposed surety is suitable.
20. As per section 2(1) of the Bail Act a surety is a person other than the accused person or a person under 18 years whom a police officer or court determines to be acceptable to provide confirmation of the accused person's bail undertaking or security that such undertaking will be complied with.
21. I have considered the suitability of the proposed sureties. Penisoni Tuapati, one of the proposed sureties has stated that he is a friend of the Applicant's son. He is employed as a driver in Fiji and earns \$ 270-\$300 fortnightly. He has deposed in his affidavit that the Applicant will find accommodation in one of the hotels in Nadi and he will be constantly in contact with the Applicant. He has attached his bank statement and as at 08 February 2019 he has a balance of \$236.

22. The other proposed surety Suliano Moceilekutu, is a Superintendent of Police who is on pre-retirement leave. He has deposed in his affidavit that he has been a good friend of the Applicant since last year. He has not explained clearly how they became friends or the degree of acquaintance they have, apart from merely saying a good friend. He has attached a bank statement and as at 20 February 2019 he has a balance of \$ 519.
23. Undoubtedly a foreign national would find it difficult to find suitable sureties in a country where he or she does not have much community ties. However, the primary requirement of a surety is to be a person who has authority or control over the Accused person. The Applicant is a foreign national and I am not satisfied that mere friends or a mere friend of the Applicant's son would be in a position to secure the attendance of the Applicant in court. The proposed sureties have not explained the nature of the friendship or the strength of the acquaintances with the Applicant. Therefore, I conclude that they are not suitable sureties for the purposes of this case.
24. I am mindful of the fact that the court has to consider the time that he will be spending in custody pending trial. The State is yet to file the Information. However, this is a case which would receive priority over the other matters due to the nature of the offence, age of the victim and the circumstances of the Applicant. As a result of the new case management measures in place, this case can be heard without delay if the parties agree to transfer this case to Suva High Court for trial. In the alternative it can be fixed for trial towards the end of this year by prioritizing it, having considered the age of the victim and the circumstances of the Applicant. Therefore, I do not have any reason to believe that the Applicant will have to spend a prolonged period in custody pending trial.
25. In *Kreimanis v State* [2012] FJHC 1316; HAM86.2012 (6 September 2012) where a foreign national was involved Justice Nawana observed the following while refusing bail;

“Accordingly, I conclude that the granting of bail to the applicant in this case is certainly not in public interest, which attracts paramount consideration in granting bail under the Bail Act in Fiji. In the result, bail is refused. Refusal of bail, even after ten-month long detention on remand, is

within the statutory framework of the Bail Act – especially under Section 13(4) of the Act- which empowers court to detain an accused on remand for a maximum period of two years before the trial in appropriate circumstances.”

26. The counsel for the Applicant made lengthy submissions at the hearing and cited a number of decisions on bail. (Keresoni Nauwa v State Crim. Misc Case No HAM 261/2012, Aporosa Nacewa v State Crim. Misc. Case No HAM 128 of 2015, Narain Sammy Naidu v State Crim. Misc. Case No HAM 108 of 2016, Ritesh Kumar v State Crim. Misc. No HAM 001 of 2014, Josaia Mocesara Leone v State Crim. Misc No HAM 66 of 2017).

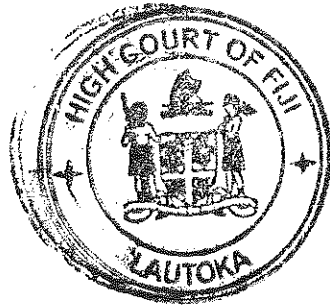
27. I have considered the submissions and the decisions cited on behalf of the Applicant. However, it should be noted that the circumstances of this case are different, and the court needs to objectively assess circumstances which are unique to this case.

28. Justice Aluthge in Leone v State [2017] FJHC 370; HAM66.2017 (22 May 2017) emphasized the importance of considering all aspects before making a determination on bail as follows;

“ A judicial officer determining bail must be satisfied that the deprivation of personal liberty is the only option available and resorting to that option is not disproportionate to the objective to be achieved thereby. If the concerns of public interests and protection of the community can be addressed by imposing stringent bail conditions, courts must not resort to curtail personal liberty, since the primary consideration in determining bail is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.”

29. After careful consideration of the material placed before this court and the submissions made on behalf of both parties I am of the opinion that granting bail to

the Applicant is not in the interest of justice. Accordingly, the application for bail pending trial is refused.



Rangajeeva Wimalasena
Acting Judge