



medical evidence) and is unable to look after the children. To allay fears of inference with witnesses, the Applicant promises to reside at Vacoko Settlement in Naboro, a considerable distance away from State's witnesses, if bail is granted.

5. The State's objection is mainly based on the grounds that the Applicant, given his bad track record and the strong evidence against him in the substantive matter, is likely not to attend Court to face his charge and that he has a tendency to commit similar type of offences while on bail, putting the public safety at risk.
6. Pursuant to Section 13 (1) (h) of the Constitution and Section 3(1) of the Bail Act of 2002 (Act), every person charged with an offence has a right to be released on bail, unless granting of bail is not in the interest of justice. There is a presumption in Section 3 (3) of the Act in favour of granting of bail. However, this presumption will be displaced under the conditions highlighted in Section 3 (4) of the Act. One of which, the most relevant to the present application, is where the person seeking bail has previously breached a bail undertaking or bail condition [S3 (4) (a)].
7. Section 17 (1) provides that the Court must consider the time a person may have to spend in custody before trial if bail is not granted. Section 17(2) provides:

*"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) provides that an accused person must be granted bail unless the court thinks:

*"(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 the granting of bail; or*

*(c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult."*

9. In forming an opinion about these factors, the court must consider all relevant circumstances, in particular –

*"(a) as regards the likelihood of surrender to custody –*

- (i) *the accused person's background and community ties (including residence, employment, family situation, previous criminal history);*
- (ii) *any previous failure by the person to surrender to custody or to observe bail conditions;*
- (iii) *the circumstances, nature and seriousness of the offence;*
- (iv) *the strength of the prosecution case;*
- (v) *the severity of the likely penalty if the person is found guilty;*
- (vi) *any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);*

*(b) as regards the interests of the accused person –*

- (i) *the length of time the person is likely to have to remain in custody before the case is heard;*
- (ii) *the conditions of that custody;*
- (iii) *the need for the person to obtain legal advice and to prepare a defence;*
- (iv) *the need for the person to be at liberty for other lawful purposes (such as employment, education, care of dependants);*
- (v) *whether the person is under the age of 18 years (in which case section 3(5) applies);*
- (vi) *whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;*

*(c) as regards the public interest and the protection of the community –*

- (i) *any previous failure by the accused person to surrender to custody or to observe bail conditions;*
- (ii) *the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person;*
- (iii) *the likelihood of the accused person committing an arrestable offence while on bail."*

10. In the affidavit filed by the State, it is stated that the Applicant has not been adversely recorded for any previous failure to surrender to custody or to observe bail conditions (paragraph 36). However, paragraph 11 of the affidavit and the charge sheets attached to it suggest otherwise.



According to the affidavit of DC Navela, the Applicant had been released on bail by the Nasinu Magistrate's Court on 26 May 2021 and failed to appear in the High Court on 3 December, 2021, whereupon a bench warrant had been issued. Furthermore, according to the charge sheets filed in the Magistrate's Court at Nasinu (which are attached to the objection affidavit), the Applicant had been charged with similar offences during the period between 2015 and 2017. In the absence of anything to the contrary, it can be assumed that the Applicant is on bail in those matters when he was alleged for the present crime. Accordingly, the resumption in favour of bail is displaced.

11. The report of Previous Convictions filed by the State indicates that the Applicant has one previous conviction for Escape from Lawful Custody reported in 2017.
12. Despite these facts, it is noteworthy that the Applicant, in his reply filed on 9 May 2022 in response to the State's objections, states that he has no previous convictions or history of breaching of bail, bench warrant or escaping from lawful custody in an apparent bid to mislead this court in his attempt to obtain bail.
13. In the process of making a bail determination, it is helpful to examine the evidence presented by the State against the Applicant in the substantive matter so that the Applicant's likelihood of absconding can be properly assessed. The stronger the case the more will be the chances for the Applicant to abscond.
14. To support State's claim that it has a strong case, DC Navela reveals two eye witnesses, the Complainant and his wife, and the alleged confession of the Applicant wherein the Applicant has admitted using a knife to threaten the Complainant and his wife. The charge against the Applicant is serious and, if proved, carries a imprisonment term up to 20 years. Under these circumstances, it is highly likely that the Applicant will abscond from court proceedings if bail is granted.
15. Before making the final determination on this bail application, it is the duty of this Court to engage in a balancing exercise concerning the interest of the Applicant and the interest of the public at large. We Judges are often inundated with bail applications with grievances concerning the plight of the defendants in the event the Applicant, who is claimed to be the sole

bread winner, is remanded in custody. The Applicant has come up with a long list of grievances relating to his personal circumstances. Most important of which is the plight of the young children who are going to be deprived of their basic needs in childhood including care and affection in the event their father going to remand.

16. According to the United Nations International Convention on the Rights of the Child (CRC), which is applicable in Fiji pursuant to Section 7 (1) (b) of the Constitution, in all acts involving children, a decision must be made after assessing what is in the best interests of the child. According to Section 41 (1) (c) of the Constitution, every child has the right to family care and Section 41(2) provides that the best interests of a child are the primary consideration in every matter concerning the child. The judicial officers cannot just ignore the rights and the best interests of the child in the process of making a determination, whether bail or otherwise, in the light of the responsibility bestowed on them by the Constitution.
17. Clearly the care of children is a relevant consideration in the grant or refusal of bail. Article 3 of the CRC which was adopted in 1989 by the United Nations General Assembly states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

18. Article 9 provides:

*State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*

19. In Devi v The State [2003] FJHC 47; HAM0003.2001s (5 March 2003) Shameem J observed:

*ethos of the Convention is clear. In all acts involving children, a decision must be made after assessing what is in the best interests of the child. The Convention is a valuable guide to the weight that a court must put on section 19(2)(b)(iv) of the Bail Act.*

20. In Davi, the best interests of the Applicant's 4 year old child was considered as a primary consideration for bail in a situation where both parents were in remand, left without a caregiver. The Court observed:



*Where, for instance, both parents are in custody and there are no arrangements for the care of children of tender years, bail should be granted because it is in the best interests of the children that they are not separated from their parents. One situation where it would not be in their best interests, would be where the parents are accused of abusing or neglecting their children. However, this is not to say that bail should always be granted where both parents are in custody. There may be circumstances where public interest considerations or the conduct of the parents themselves, would justify a refusal of bail. Each case must turn on its own facts.*

21. In the present case, the facts are considerably distinguishable from those of Devi in that the mother and mother-in-law are with the children and they can be looked after by the mother when the mother-in-law is called upon to do her 3 days house maid duties. Conversely, the Applicant in Devi was charged with a misdemeanour, had nil previous convictions, no previous bail violations and both the parents were in remand.
22. The Courts are often faced with the dilemma as to the proper course of action when hard earned money/property of innocent people is robbed and those charged with the wrongdoing return to the society pending trial as a result of a Court order.
23. The right to be released on bail for a person charged with an offence is guaranteed by the Constitution, unless granting of bail is not in the interest of justice. The notion of 'interest of justice' encompasses not only the interests of the accused but also the interests of others who are going to be affected by the decision.
24. There may be circumstances where public interest considerations would justify a refusal of bail. Each case must turn on its own facts. In the present case the Court considered the material placed before it and took an effort to strike a balance between the rights of the Applicant and public interests in line with the provisions of the Act. Most of the accused who come before this Court have dependents and a little weight is given to the personal circumstances unless their children's rights are really in danger.
25. Having carefully considered the above discussed reasons, I refuse the application of bail pending trial on the ground that the Applicant is charged with a serious offence most prevalent in Fiji and the safety of the community is likely to be put at risk. There is also a likeli-

26. Having so decided, the Court reminds the Applicant of his right to make another bail application if the trial is getting inordinately delayed. I note that no hearing date has been set, and that the Applicant has now been remanded for approximately 3 months. It is not suggested that the conditions of custody are unduly oppressive, or that he has had difficulties preparing his defence.
27. In view of the aforesaid determination, it is incumbent upon this Court to call a report from the Director of Social Welfare about the condition of the children so that more informed decisions could be made in future in respect of bail and care for the children.
28. Following Orders are made:
- i. Application for Bail is refused.
  - ii. Director of Social Welfare is ordered to file a report within three (3) weeks from today on the welfare of children of the Applicant.
29. Thirty (30) days to appeal to the Fiji Court of Appeal.



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**Hon. Mr. Justice Aruna Aluthge**

**At Suva**

3 June 2022

**Solicitors:**

Applicant In Person.

Office of the Director of Public Prosecutions for Respondent.