

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Criminal Misc. Application No HAM 190 of 2022**  
**Criminal Case No. HAC 206 of 2022**

**BETWEEN** : **ARE WAIONA**

**AND** : **THE STATE**

**Appearances** : Mr. Varinava T for the Applicant  
: Ms. Semisi, K and Ms. Elo, W for the State

**Date of Ruling** : 12 September 2022

**RULING**

1. The Applicant is charged with a count each of rape and of sexual assault. The Complainant is his step daughter who would have been between 7 - 8 years old at the time of the alleged rape in Count 1, and 15 years old at the time of the sexual assault alleged in Count 2. The Applicant is 38 years old.
2. He was produced in the Magistrate's Court on 16 June 2022. He has been held in remand since then.
3. He first appeared in the High Court on 30 June 2022. Information and disclosures have been served and the Applicant has pleaded not guilty to both counts on the information. There are no admissions in the cautioned interview statement. The substantive matter is at the pretrial conference stage and has been adjourned to 11 October 2022 to fix for trial.

4. Prior to his arrest, the Applicant had been working as a glass cutter for a glass and mirror company in Walu Bay.
5. Before the Court now is an application for bail pending trial to allow him to return to his family and to work to support his sickly wife and two daughters. He deposes he has no pending cases before the Courts and has no previous convictions. He proposes his step-father and a younger brother as sureties and says he will reside at Dakua Road, Cunningham Stage 4, close to or with his sureties. He is willing to report to the nearest Police Station and to abide by any curfew imposed by the Court.

#### **The State's objection**

6. The State objects to bail on the basis that this is a domestic violence offending and the presumption in favour of bail is therefore displaced. The charges are serious and if convicted, the Applicant will be facing an imprisonment term. The younger brother proposed as surety is not in a position of control over the Applicant.
7. Investigating officer WDC 3645 Salote deposes that the Complainant now lives at Nairai Road in Raiwaqa with her mother's younger sister, Salote Finau. Before he was charged, the Applicant had approached the Complainant on 13 June 2022 and asked her to withdraw her complaint to the Police. The Complainant's aunt had also written a withdrawal letter as she was approached by the Complainant's mother to withdraw the case.
8. The investigating officer also deposes that the Complainant has been constantly approached by her mother who is still in a de-facto relationship with the Applicant to withdraw this case. Her mother has been warned by the Police. There is a high likelihood of interference with the Complainant and there is a need to protect her, the public interest and the community.
9. In reply, the Applicant denies ever approaching the Complainant prior to being charged, to request a withdrawal of her complaint. The Complainant left their home at Dakua Road, Cunningham Road sometime in April this year to stay with her aunt and since then, he has

not seen or met her. He has been in custody since 13 June 2022 and have not been visited by any family members. He is only able to meet his family during his Court dates and has not asked any of them to approach the Complainant or interfere with State witnesses in any manner.

### Analysis

10. Bail is governed by the provisions of the Bail Act 2002. Section 3 of the Act provides that every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted. Section 3 (3) sets out a presumption in favour of bail. These provisions are consistent with every accused person's right to be presumed innocent until proven guilty according to law.
11. The presumption in favour of bail is, however, displaced where the person seeking bail is charged with a domestic violence offence. (Section 3 (4), Bail Act)
12. In this case, the Applicant is the Complainant's step-father. The alleged offences were committed whilst the Complainant was living with her mother and Applicant. There is therefore a family or domestic relationship as defined in the Domestic Violence Act.
13. The offences alleged against the Applicant are sexual in nature and come within the definition of violence under the Domestic Violence Act.
14. This being an alleged domestic violence offending, the presumption in favour of bail is displaced.
15. Section 17 (1) requires that when deciding whether to grant bail, the Court must take into account the time the person may have to spend in custody before trial if bail is not granted. In Kumar v State [2020] FJHC 873; HAM226.2020 (23 October 2020), Goundar J stated:

The current practice of this Court is to hear the trial of an accused person who has been refused bail within 12-18 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 12-18 months.

16. Section 17 (2) states 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. Notwithstanding there being no risk of the Accused person not appearing, bail may still be refused if the Court is of the opinion that the interests of the accused person will not be served through granting of bail or, that enlarging the accused on bail would endanger the public interest or make the protection of the community more difficult. (Section 19 (1) (b) (c), Bail Act)
17. The charges against the Applicant are serious and committed within a family or domestic setting. The Complainant's mother is still in a relationship with the Applicant. The evidence before the Court is that both the Applicant and his wife, the Complainant's mother, and her sister, had tried to persuade the Complainant to withdraw the complaint against him.
18. The Applicant denies these allegations against him, or involvement with the Complainant's aunt's and mother's attempts to withdraw the case against him.
19. I have considered the before the Court. There is no evidence that the Applicant will not or is not likely to appear in Court. There is no history of absconding bail or of breach of bail conditions. Nor has it been shown that it is not in the interests of the Applicant to be on bail.
20. However, there is some evidence of interference not only from him but also from the Complainant's mother who is still in a relationship with him, as well as from the Complainant's mother's sister. While the Applicant has denied any interference on his part, I bear in mind what Goundar J stated in State v Tuimouta [2008] FJHC 177; HAC078.2008 (18 August 2008) at [8]:

A bail hearing is not a trial. In a trial the prosecution carries the burden of proof to satisfy the guilt of an accused beyond a reasonable doubt. In a bail hearing the prosecution carries the burden of proof on balance of probability that the accused should not be granted bail.

21. I have considered the disclosures filed by the State in support of the charges against the Applicant. (*Tavutu v State* [2018] FJHC 886; HAM244.2018 (21 September 2018) The Complainant is now 15 years old and would have been between 8 and 9 years old at the time of the alleged rape, and 15 years old at the time of the alleged sexual assault. From her Police Statement, the alleged incidents occurred when she was living with her mother and the Applicant. Both incidents happened when her mother was out of the house and she was left at home with the Applicant. According to her statement, the Applicant used to “smack” her mother most of the time and that she would go away from the house so as not to hear her mother crying. They could not report to the Police for fear of the Applicant.
22. In my opinion, the family relationships involved and the vulnerability of the Complainant by virtue of her young age and dependence make interference a real likelihood. I do not consider stringent bail conditions are capable of alleviating the risk of interference with the Complainant and any family members who are or could be Prosecution witnesses in this case. For this reason, I conclude that it is against the public interest for the Applicant to be enlarged on bail.
23. Bail is refused accordingly.



  
—Stainia F. Bull  
**Acting Puisne Judge**

**Solicitors:**

Legal Aid Commission for the Applicant  
Office of the Director of Public Prosecutions for the State

