

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 37 OF 2022**

**IN THE MATTER** of an Appeal from the Decision of the Resident Magistrate, Magistrate's Court of Ba, in Criminal Case No. CR 455 of 2022.

**BETWEEN** : FAREEZ KHAN

**APPELLANT**

**AND** : THE STATE

**RESPONDENT**

**Counsel** : Mr. Rajiv Prakash with Mr. Filimoni Daveta for the Appellant  
Mr. Joeli Nasa for the Respondent

**Date of Hearing** : 5 January 2023

**Judgment** : 16 January 2023

**JUDGMENT**

- [1] This is an Appeal made by the Appellant against the Ruling of the Resident Magistrate, Magistrate's Court of Ba, refusing him bail.
- [2] In the Magistrate's Court of Ba, the Appellant was charged with one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act No. 44 of 2009 (Crimes Act), one count of Criminal Intimidation, contrary to Section 375 (1)(a)(i) and (iv) of the Crimes Act and two counts of Breach of Bail Condition, contrary to Section 26

(1) of the Bail Act No. 26 of 2002 ("Bail Act"), as amended by Bail (Amendment) Act No. 28 of 2012.

[3] The full details of the charges are said to read as follows:

**COUNT 1**

**STATEMENT OF OFFENCE**

**ASSAULT CAUSING ACTUAL BODILY HARM:** Contrary to Section 275 of the Crimes Act No. 44 of 2009.

**PARTICULARS OF OFFENCE**

**FAREEZ KHAN**, on the 18<sup>th</sup> day of July 2022, at Varavu, Ba, in the Western Division, assaulted **PRIYA PRASAD**, thereby occasioning her actual bodily harm.

**COUNT 2**

**STATEMENT OF OFFENCE**

**CRIMINAL INTIMIDATION:** Contrary to Section 375 (1) (a) (i) and (iv) of the Crimes Act No. 44 of 2009.

**PARTICULARS OF OFFENCE**

**FAREEZ KHAN**, on the 18<sup>th</sup> day of July 2022, at Varavu, Ba, in the Western Division, without lawful excuse threatened **PRIYA PRASAD**, with a concrete block with intent to cause alarm to the said **PRIYA PRASAD**.

**COUNT 3**

**STATEMENT OF OFFENCE**

**BREACH OF BAIL CONDITION:** Contrary to Section 26 (1) of the Bail Act No. 26 of 2002 as amended by Bail Amendment Act No. 28 of 2012.

**PARTICULARS OF OFFENCE**

**FAREEZ KHAN**, on the 18<sup>th</sup> day of July 2022, at Varavu, Ba, in the Western Division, whilst being released on bail by Ba Magistrate's Court, Criminal Case Number 163/22 with the condition not to reoffend, breached the said condition by reoffending.

## COUNT 4

### STATEMENT OF OFFENCE

**BREACH OF BAIL CONDITION:** Contrary to Section 26 (1) of the Bail Act No. 26 of 2002 as amended by Bail Amendment Act No. 28 of 2012.

### PARTICULARS OF OFFENCE

**FAREEZ KHAN**, on the 24<sup>th</sup> day of September 2022, at Ba Police Station, Ba, in the Western Division, breached the condition of bail by not reporting at Ba Police Station, a condition imposed by Ba Magistrate's Court, Criminal Case Number 163/22.

- [4] The Appellant had made an application in the Magistrate's Court of Ba seeking bail. However, by Ruling dated 11 October 2022, the Learned Resident Magistrate had refused bail.
- [5] Aggrieved by the said Order, on 14 October 2022, the Appellant filed a timely appeal in the High Court.
- [6] This matter was taken up for hearing before me on 5 January 2023. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [7] As per the Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

### Grounds of Appeal

1. **THAT** the Learned Magistrate erred in law by failing to consider the presumption of innocence of the Appellant in the determination of bail.
2. **THAT** the Learned Magistrate erred in law when she considered the issues of likelihood of the Appellant committing an arrestable offence whilst being on bail to justify concern of public interest when there is no evidence placed before the Court for that effect.
3. **THAT** the Learned Magistrate erred in law in putting too much emphasis on the pending cases to assist her in the determination of bail.

4. **THAT** the Learned Magistrate erred in law by failing to effectively canvass the grounds of bail of the Appellant thereby encumbering the right to bail pending trial.
5. **THAT** the Learned Magistrate erred in law by failing to consider and properly analyse the applicable laws and case authorities that support the interest of the Appellant.
6. **THAT** the Learned Magistrate's decision to refuse bail is unfounded, biased and improperly analysed.

### **The Law and Analysis**

**[8]** Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation,*

*restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."*

[9] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*"(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

### **The Grounds of Appeal**

[10] The Grounds of Appeal are that the Learned Resident Magistrate erred in law by refusing the application for bail on the following grounds:

-by failing to consider the presumption of innocence of the Appellant in the determination of bail;

- by considering the issues of likelihood of the Appellant committing <sup>an</sup> ~~an~~ arrestable offence whilst being on bail to justify concern of public interest when there is no evidence placed before the Court to that effect;
- by putting too much emphasis on the pending cases against the Appellant to assist her in the determination of bail;
- by failing to effectively canvass the grounds of bail urged by the Appellant;
- by failing to consider and properly analyse the applicable laws and case authorities that support the interest of the Appellant; and
- that the decision to refuse bail is unfounded, biased and improperly analysed.

[11] I find that all the above Grounds of Appeal are inter-related. As such, they will be addressed together.

[12] In her Ruling the Learned Resident Magistrate has stated that the Appellant was seeking bail to go back to his family especially his parents and since he is self employed as a sugar cane farmer.

[13] The Learned Resident Magistrate has further stated that the State had been objecting to bail on the following grounds:

- (a) That this is a domestic violence related offending.
- (b) That the Applicant (Appellant) is also charged with a breach of bail condition.
- (c) That the Applicant (Appellant) has not been signing his bail at the Police Station and was evading Police since July 2022.

[14] The Learned Resident Magistrate has stated that in terms of Section 3(1) of the Bail Act that: *“Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted.”*

[15] She has also made reference to Section 3(3) of the Bail Act which provides that: *“There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.”*

[16] The Learned Resident Magistrate has correctly pointed out that in terms of Section 3(4) of the Bail Act, as amended by the Domestic Violence Act No. 33 of 2009 (*“Domestic*

Violence Act”), the presumption in favour of granting of bail is displaced in the following circumstances:

- (a) the person is seeking bail has previously breached a bail undertaking or bail condition; or*
- (b) the person has been convicted and has appealed against the conviction; or*
- (c) the person has been charged with a domestic violent offence.*

[17] Since there is said to be a domestic relationship between the Appellant and the complainant in this matter, it is clear that the presumption in favour of granting of bail is displaced in this case.

[18] The Learned Resident Magistrate has stated that considering the application for bail and submissions filed by the State, that this application falls within the ambit of Section 19 of the Bail Act.

[19] Section 19(1) of the Bail Act, as amended by the Domestic Violence Act, provides for grounds for the Court to refuse to grant bail. The sub section is reproduced below:

*“An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be-*

- (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;*
- (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."*

- [20] It must be pointed out that when making reference to Section 19 (1) of the Bail Act in her Ruling, the Learned Resident Magistrate has failed to mention Section 19 (1) (d), which was an amendment introduced by way of the Domestic Violence Act.
- [21] Furthermore, the Learned Resident Magistrate has erroneously stated [At paragraph 11 of her Bail Ruling] that in considering the application for bail the burden is on the prosecution to rebut the presumption in favour of bail on the balance of probability. This is a reference to Section 18 of the Bail Act.
- [22] Since there is a domestic relationship between the Appellant and the complainant in this matter, there is no burden on the prosecution to rebut the presumption in favour of bail. In fact, in terms of Section 3(4) of the Bail Act the presumption stands displaced.
- [23] However, it must be highlighted that later in the same paragraph of her Bail Ruling the Learned Magistrate has gone on to rectify the above error by accurately stating the position of the law in the following manner: *"Having said that I pertinently note that the gist of the prosecution objections to bail is based on the offending being a domestic violence related offending and that the accused already has cases pending before this Court for which he had been granted bail. According to the new amendments to the Bail Act 2002, the presumption of right to bail is displaced when the accused has been charged with a domestic violence offence. Therefore, there is no presumption of right to bail as it has being already displaced."*
- [24] Therefore, the first Ground of Appeal that the Learned Resident Magistrate failed to consider the presumption of innocence of the Appellant in the determination of bail is without merit. What is relevant and applicable for the consideration of bail is the presumption in favour of granting of bail. However, in this case since the Appellant has been charged with a domestic violence offence the presumption in favour of granting bail has been displaced.



- [25] The second Ground of Appeal taken up by the Appellant is that the Learned Resident Magistrate considered the issues of likelihood of the Appellant committing an arrestable offence whilst being on bail to justify concern of public interest, when there is no evidence placed before the Court to that effect. Similarly, the third Ground of Appeal is that the Learned Resident Magistrate put too much emphasis on the pending cases against the Appellant to assist her in the determination of bail.
- [26] It must be emphasized that what is before me is only the Bail Ruling made by the Learned Resident Magistrate and the written submissions filed by both parties. The original Magistrate's Court record was not called for during these proceedings.
- [27] It is manifest from the Bail Ruling that the Learned Resident Magistrate has given much weight to the fact that the Appellant has committed the offences for which he is charged whilst being on bail for another offence before the Magistrate's Court. This Court is satisfied that this is sufficient evidence for the Learned Resident Magistrate to come to a finding that there is a likelihood of the Appellant committing another arrestable offence in the event of him being granted bail.
- [28] Therefore, the second and third Grounds of Appeal are also without merit.
- [29] The fourth Ground of Appeal is that the Learned Resident Magistrate failed to effectively canvass the grounds of bail urged by the Appellant, whilst the fifth Ground of Appeal is that the Learned Resident Magistrate failed to consider and properly analyse the applicable laws and case authorities that support the interest of the Appellant. The final Ground of Appeal is that the Learned Resident Magistrate's decision to refuse bail was unfounded, biased and improper.
- [30] Having duly analysed the Bail Ruling of the Learned Resident Magistrate, it is the opinion of this Court that these Grounds of Appeal are also without merit.
- [31] In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's decision in refusing bail to the Appellant in this matter.

**Conclusion**

[32] Accordingly, I conclude that this Appeal should stand dismissed.



  
Riyaz Hamza  
**JUDGE**  
**HIGH COURT OF FIJI**

**AT SUVA**

This 16<sup>th</sup> Day of January 2023

**Solicitors for the Appellant :**  
**Solicitors for the Respondent:**

**Niudamu Lawyers, Barristers and Solicitors, Ba.**  
**Office of the Director of Public Prosecutions, Lautoka.**