

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CRI 2009-004-8563

AUKUSITINO FA'ATAFA
Appellant

v

POLICE
Respondent

Hearing: 4 September 2009

Appearances: M Tuilotolava for appellant
A McClintock for respondent

Judgment: 4 September 2009

JUDGMENT OF ALLAN J

*Solicitors:
Ferguson Tuilotolava PO Box 76616 Manukau City
Crown Solicitor Auckland*

[1] Mr Fa'atafa faces charges of sexual offending for which he has been committed for trial in this Court. Very briefly, the Crown case is that in the course of walking home from an evening out, the accused encountered a 13 year old girl on the footpath. The Crown alleges that after engaging in some preliminary conversation, the accused forced her off the road and onto an area of public land where she was raped and subjected to other indignities.

[2] The defence case is that although sexual activity between the accused and the complainant occurred, the act of sexual intercourse which underpins these charges was consensual and the accused was in essence invited by the young complainant to have sex with her.

[3] Mr Fa'atafa has been in custody since his initial arrest in April 2009. The trial date is 24 May 2010. Accordingly, if Mr Fa'atafa remains in custody he will have been on remand for more than a year.

[4] An earlier application for bail came before Priestley J on 26 May 2009. At that time the Judge declined bail. He took the view that the Crown case was strong. I can only share that view. It seems inherently unlikely that a 13 year old girl would invite this 34 year old accused to have sexual intercourse with her in a public place at 9.30 am, but that will ultimately be a matter for the jury.

[5] The Judge was concerned that the appellant had spent the previous evening consuming a quantity of alcohol, and that during the course of the previous evening, he had had sex with another woman. Priestley J was plainly troubled by the fact the accused appeared to lack inhibitions in the area of sexual activity when he had consumed significant quantities of alcohol, and thought the risk of offending while on bail was significant for that reason. It must be said however, that Mr Fa'atafa's previous record is limited to blood alcohol offences. Neither is there any record of offending whilst on bail.

[6] The Judge considered there might be some prospect of a successful application for bail in the future if it could be shown the appellant had realistic work

prospects which would occupy him during the day, and so lessen the risk he might simply offend because he was at a loose end, and if there was a degree of family supervision which would provide the necessary constraints. The Judge left the door to a further bail application open.

[7] The question of bail has now been reopened by this application. The Court has a letter from Mr Fa'atafa's employer, Brian Perry Civil. Mr Fa'atafa is employed as a hammer hand with a drainage crew employed by that company. He commenced that employment in May 2004, so there is evidence of an ability to maintain stable employment. The employer's letter indicates that employment remains open, but only if bail is granted to Mr Fa'atafa today. Having said that, the letter flags the possibility of redundancy not only for Mr Fa'atafa, but for other employees at some stage in the future, having regard to the current economic climate. The letter also indicates that Mr Fa'atafa would not necessarily be under constant supervision while working at various locations across the Auckland region.

[8] It is proposed that Mr Fa'atafa be bailed to the address of his sister and her husband. They have filed affidavits consenting to the grant of bail and have indicated they have an appreciation of the seriousness of the charges faced by the accused, and the implications of providing a bail address.

[9] Ms McClintock raises a particular concern about the fact that this couple has a physically disabled nine year old daughter, who is part of the household, and who may present temptation to a man who has behaved as Mr Fa'atafa admittedly has.

[10] The Crown opposes bail essentially because there is a risk of further sexual offending, Ms McClintock submits, particularly in the context of on-going alcohol use. There is no doubt there is a measure of risk which was identified by Priestley J, and Ms McClintock's submission is responsibly made. The question is whether it is a sufficiently serious risk that it cannot be met by the imposition of suitable conditions in circumstances where this man will not go to trial for about eight months.

[11] I consider the imposition of suitable conditions will be sufficient to minimise the risk of further offending, and therefore it is appropriate to grant bail.

- a) The accused is to live at 43 Marsters Place, Mangere East;
- b) He is to observe a 24 hour curfew at that address unless he is at his place of employment at Brian Perry Civil, or is in transit between that place of employment and 43 Marsters Place, Mangere East, or is travelling to or attending at Court or with his lawyer.
- c) He is to abstain from the possession or consumption of alcohol or illicit drugs;
- d) He is to present himself at the door during curfew hours at the request of any member of the police;
- e) At all times when the accused is at 43 Marsters Place, Mangere East, he must be under the supervision of either Mrs Antonina Toleafoa or Mr Tepau Toleafoa.
- f) He is not to have contact with any person under the age of 16 years unless supervised by either Mr or Mrs Toleafoa;
- g) He is directed to surrender his passport and any other travel documents to the Registrar of the High Court by 4 pm on Monday 7 September 2009, and he is not to apply for any fresh passport or any other travel document;
- h) The accused is not to associate or communicate with the complainant or any other Crown witness either directly or indirectly, except for the accused's wife.