

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court of Fiji]**

**CRIMINAL APPEAL NO. AAU0053 of 2015**  
**[High Court Case No. HAC76 of 2008]**

**BETWEEN** : JOJI KACIVAKAWALU

*Appellant*

**AND** : THE STATE

*Respondent*

**Coram** : Hon. Mr Justice Daniel Goundar

**Counsel** : Appellant in person  
Mr Y Prasad for the Respondent

**Date of Hearing** : 12 October 2017

**Date of Ruling** : 20 October 2017

**RULING**

- [1] This is an application for bail pending appeal. The State opposes the application.
- [2] The appellant was charged with 2 counts of robbery with violence and 1 count of unlawful use of motor vehicle. Following a trial in the High Court, he was convicted of all the charges and sentenced to a total term of 11 years' imprisonment with a non-parole period of 9 years. On 22 June 2017, Calanchini P granted him leave to appeal against conviction only on the question whether the appellant's confession was correctly admitted in evidence.

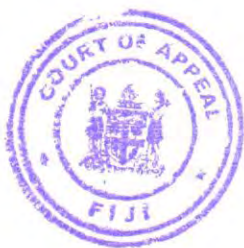
- [3] At the trial, the prosecution relied upon the appellant's confession to police. The appellant challenged the admissibility of the confession on the ground that it was extracted from him using force and violence. The learned trial judge determined the admissibility in a voir dire. The appellant gave evidence and produced a medical report in which the examining doctor had observed 'contusions in the lower back area'. It seems that the prosecution neither challenged the medical evidence nor offered any explanation for the injury on the appellant. The gist of the appellant's complaint is that the learned trial judge neither considered the independent medical evidence in his voir dire ruling nor did he direct the assessors to consider the medical evidence when deciding on the weight of the confession.
- [4] Like the application for leave, the application for bail was filed by the appellant in person. The appellant's main contention is that he had been granted leave to appeal and that he had already served a significant period of his 11 years' imprisonment sentence.
- [5] The test for bail pending appeal is more stringent than the test for leave. When considering granting of bail to a convicted person, the court must bear in mind that the presumption in favour of grant of bail is displaced. The Bail Act 2002 specifically requires the court to consider the following factors when considering bail pending an appeal:
- (a) The likelihood of success in the appeal;
  - (b) The likely time before the appeal hearing;
  - (c) The proportion of the original sentence which will have been served by the appellant when the appeal is heard.
- [6] The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015).

- [7] In the present case, the question of admissibility of the appellant's confession was for the trial judge to decide. He decided to admit the confession in evidence after holding a voir dire. Written reasons were given for the ruling. The Full Court will only upset the ruling if it is shown that the learned trial judge had made a complete wrong assessment of the evidence or had applied wrong principles. It is not an issue whether the correct principles were applied. The issue is whether a correct assessment of the evidence was done.
- [8] At this stage, it is not possible to make a determination that the learned judge has made a complete wrong assessment of the evidence including the medical evidence of injury found on the appellant in his voir dire ruling. That assessment can only be made by the Full Court by having regard to the entire evidence led at the voir dire. Similarly, whether the medical evidence of injury had a bearing on the weight of the confession is a matter for the Full Court. They are not issues that satisfy the threshold of a very high likelihood of success.
- [8] It therefore follows that the two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been met (*Seniloli & Others v The State* unreported Cr App No. AAU0041/04S; 23 August 2004). The court records have been filed and the appeal is ready to be heard. However, the appeal is unlikely to be heard this year. There is a chance that the appeal could be heard by mid 2018 or at least by the end of 2018. The appellant was sentenced in April 2015. By the time this appeal is heard in 2018, the appellant will have served about three years of his sentence of 11 years imprisonment. The portion of the sentence that the appellant will have served before his appeal is heard is not substantial.
- [9] When considering the factors under section 17(3), the court may also consider exceptional circumstances, that is, "circumstances which drive the court to the conclusion that justice can only be done by granting bail" (*Mudaliar v The State* unreported Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P). From the submissions presented to this Court, there are no exceptional circumstances to grant bail.

[10] For these reasons, the application for bail fails.

**Result**

[11] Bail refused.



A handwritten signature in black ink, appearing to be "D. Goundar", written in a cursive style.

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The Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

Appellant in person

Office of the Director of Public Prosecutions for the Respondent