

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

CRIMINAL APPEAL NO. AAU0102 of 2014
[High Court Case No. HAC283 OF 2012S]

BETWEEN : ALIPATE LESI

Appellant

AND : THE STATE

Respondent

Coram : Hon. Mr Justice Daniel Goundar

Counsel : Mr S Waqanaibete for the Appellant
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] Following a trial in the High Court at Suva, the appellant and three others were convicted of aggravated robbery and unlawful use of a motor vehicle and sentenced to 14 years' imprisonment with a non-parole period of 12 years. On 8 June 2015, I granted the appellant leave to appeal against conviction. The grounds on which the appellant was granted leave in summary are:

- The appellant's confession was inadmissible because he had been in custody for more than 48 hours.
- The assessors were not directed to consider the weight or the truth of the appellant's confession.
- The bad character evidence in the form of previous conviction contained in the appellant's caution interview should have been excluded.
- The assessors should have been directed to disregard the appellant's bad character evidence in the summing up.

[3] 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 there is now unreasonable delay in hearing the appeal.

[4] In considering this application for bail, I bear in mind that 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.

[5] 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).

[6] 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, and at this stage, it is not possible to make a determination that the learned trial judge had made a complete wrong assessment of the evidence. Similarly, the correctness of trial judge's direction on the appellant's confession is a matter for the Full Court to consider.

[7] At the trial, the appellant was represented by counsel. No objection was taken with the trial judge to exclude the bad character evidence. Arguably, the issue was waived. In my judgment, the grounds of appeal for which leave has been granted do not satisfy the threshold of a very 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 early 2018 or at least by mid 2018. The appellant was sentenced on 16 May 2014. By the time this appeal is heard in 2018, the appellant will have served about 4 years of his sentence of 14 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 "Daniel Goundar", written in a cursive style.

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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Director of Legal Aid for the Appellant

Office of the Director of Public Prosecutions for the Respondent