

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

CRIMINAL APPEAL NO. AAU0072 of 2018
[High Court Case No. HAM 41 of 2018]

BETWEEN : **SERU KOROI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Gamalath JA
Goundar JA

Counsel : **Ms S Ratu for the Appellant**
Mr R Kumar for the Respondent

Date of Hearing : **17 September 2018**

Date of Judgment : **7 March 2019**

JUDGMENT

Calanchini P

[1] I have read in draft form the judgment of Goundar JA and agree with his proposed orders.

Gamalath JA

- [2] I have read the draft Judgment of His Lordship Goundar JA and I am in agreement with the reasons contained therein and its decision.

Goundar JA

- [3] This is an untimely application for leave to appeal against a decision of the High Court refusing to grant the appellant bail pending trial.
- [4] The appellant is charged with one count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act which he allegedly committed on 17 January 2018. He has been in custody on remand since 19 January 2018. The trial is currently pending in the High Court.
- [5] When the appellant was arraigned on the charge in the High Court, he entered a plea of not guilty. He made a formal application for bail through his counsel and that application was heard on 17 April 2018. On 23 April 2018, the High Court refused the application for bail.
- [6] On 6 September 2018, the appellant filed a notice of appeal seeking leave to appeal against the High Court's decision refusing to grant him bail. On 14 September 2018, he filed a further application seeking an enlargement of time to appeal.
- [7] The discretion to enlarge the statutory appeal period is exercised in a principled manner by taking into account the following factors:
- (i) The reason for the failure to file within time.
 - (ii) The length of the delay.
 - (iii) Whether there is a ground of merit justifying the appellate court's

consideration.

- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?
(Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012))

- [8] While these are relevant factors to be considered, they are not an exhaustive list. The ultimate test is whether it is in the interests of justice in the particular case to enlarge the statutory appeal period (*Cama v State* [2012] FJSC 4; CAV0003.09 (1 May 2012)).
- [9] The statutory appeal period to appeal against any decision to the Court of Appeal is 30 days (section 26 of the Court of Appeal Act). The appeal is late by about 3 ½ months. According to the appellant, he made two further applications for bail after the initial application was refused on 23 April 2018. When he did not succeed with his further attempts to secure bail, he wrote to the Court of Appeal on 25 July 2018. On 17 August 2018, he sought assistance from the Legal Aid Commission. On 24 August 2018, the Legal Aid Commission made their first appearance on behalf of the appellant and thereafter they made this formal application to seek an enlargement of time to appeal.
- [10] The sole ground of appeal is that:

The learned judge erred in law and in fact when he refused bail of the Applicant without taking into account certain relevant considerations.

- [11] On appeal an appellate court reviews a bail decision for an error of principle or fact in the exercise of the discretion granting or refusing bail (*R v Payne [Burrett's Case]* [2003] 3 NZLR 638 (CA)). The main argument of the appellant is that the learned High Court judge failed to consider the presumption of innocence when refusing to grant him bail.


- [12] The Bail Act 2002 (the Act) codifies much of the law relating to bail. Part II of the Act contains provisions of general application. Section 3(1) of the Act states that an accused is entitled to bail unless it is not in the interests of justice that bail should be granted. In *State v Shankar* [2003] FJHC 50; HAM 14.2003 Justice Gates (as he was then) observed that an entitlement to bail does no more than reflect the principle of the presumption of innocence, which is also contained in the Constitution. However, a person may be deprived of personal liberty if he is reasonably suspected of having committed an offence. Therefore it is clear that whilst preserving the right of innocence of an accused person he could be still deprived of his personal liberty pending trial (*Qio v State* [2015] FJCA 68; AAU0140.2014 (28 May 2015)).
- [13] Section 17(2) of the Act states that the primary consideration in determining whether to grant bail is the likelihood of the accused appearing in court to answer the charge against him or her. Although the primary consideration is whether the accused will turn up for his trial, section 19(1) provides for two further grounds for refusing bail, namely, that the interests of the accused will not be served through the granting of bail (subsection (b)), or that granting of bail to the accused would endanger the public interest or make the protection of the community more difficult (subsection (c)).
- [14] The primary reason for refusing bail is contained in paragraph 6 of the learned High Court judge's written ruling. His lordship took into consideration that the appellant had convictions for similar offences to come to an opinion that granting bail would endanger the public interest or make the protection of the community more difficult.
- [15] It is not in dispute that the appellant has three previous convictions (2 for burglary and 1 for theft) in 2014. He was given a sentence of 18 months imprisonment suspended for 3 years for these offences. It is not clear whether the appellant has allegedly reoffended during the operational period of the suspended sentence, but the nature of the fresh allegation he is now facing is similar to his previous convictions. The appellant is accused of a home invasion robbery.

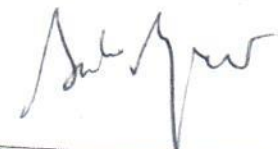
- [16] While the learned High Court judge was very economical with his reasons for coming to the conclusion that granting bail would endanger the public interest or make the protection of the community more difficult, I am not convinced that he made an error of principle or fact in the exercise of his discretion. Given the appellant's previous criminal record, the High Court was correct to deprive the appellant of his liberty in the interests of justice, that is, to keep the community safe.
- [17] For these reasons, I would grant an enlargement of time and leave, but dismiss the appeal.


Orders of the Court:

1. Enlargement of time and leave granted.
2. Appeal dismissed.




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Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL


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Hon. Justice Suhada Gamalath
JUSTICE OF APPEAL


.....
Hon. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent