**IN THE COURT OF APPEAL**
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 0063 OF 2012**
**[High Court Criminal Case No. HAC 049of 2012]**

**BETWEEN** : **ASHWIN CHAND**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Calanchini, P**
**Gamalath, JA**
**Prematilaka, JA**

**Counsel** : **Appellant in Person**
**Ms. S. Puamau for the Respondent**

**Date of Hearing** : **11 May 2016**

**Date of Judgment** : **27 May 2016**

# JUDGMENT

**Calanchini, P**

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

**Gamalath, JA**

[2] I agree with the reasoning and conclusion of Prematilaka JA.

**Prematilaka, JA**

[3] This appeal arises from the conviction of the Appellant on two counts: one under section 194 (1) (g) of the Crimes Decree, 2009 and the other under section 255 (b) of the Crimes Decree, 2009. The Amended Information dated 19 June 2012 describes the particulars of the first count as having caused a disturbance during the judicial proceedings on 5 March 2012 in that the Appellant had thrown papers in the direction of the Prosecutor and walked out of the Dock without the court's leave, prior to the rising of the Court for that day. The particulars of the second count allege that the Appellant on 06 March 2012 with intent to cause grievous harm to the Learned Trial Judge had unlawfully attempted to strike him with a projectile, namely a concrete fragment. The Appellant had thereby been accused of having committed the offences under 194 (1) (g) and 255 (b) of the Crimes Decree, 2009 respectively.

**Preliminary Observations**

[4] The Appellant had pleaded guilty on 02 August 2012 before a different High Court Judge. Summary of Facts filed by the Respondent had been read over to the Appellant which he had admitted. Both the Appellant and the Respondent had filed submissions on the sentence. The State Counsel had informed the Learned High Court Judge that she had no objection to the Court imposing a concurrent sentence on the Appellant who was already serving a sentence of life imprisonment with a non parole period of 22 years.

[5] Thereafter, the High Court Judge had proceeded to deliver the order on the sentence on 03 August 2012 and imposed a sentence of 08 weeks imprisonment on count 01 and five years of imprisonment on count 2. A three year non parole period was also imposed. The Learned Judge had further directed that both sentences should run concurrent to each other but consecutively to the existing life sentence.

[6] The Appellant on 06 August 2012 had filed a notice of application for leave to appeal against both the conviction and sentence. One of the grounds urged on the sentence was

the failure on the part of the Trial Judge to order both sentences to run concurrently to the Appellant's serving sentence. Later the Appellants had added several other grounds against the conviction and maintained the aforesaid ground of appeal against the sentence throughout. Both the Appellant and the Respondent had tendered written submissions on the matter of the application for leave to appeal.

[7] The Appellant had been unrepresented and appeared in person at the hearing of the leave to appeal application against the sentence and conviction. Justice Goundar in the Ruling dated 11 March 2015 had rejected the grounds of appeal against the conviction and granted leave on all grounds of appeal against the sentence.

**Grounds of Appeal**

[8] The grounds of appeal so allowed are as follows.

(i) The Learned Trial Judge had considered the Appellant's previous convictions as an aggravating factor to enhance the sentence.

(ii) The Learned Trial Judge had erred in ordering the sentences on count 1 and 2 to run consecutively to the Appellant's existing sentence of life imprisonment.

(iii) The combination of the above two grounds had resulted in an excessive sentence on the Appellant.

[9] The Appellant in his written submissions filed in respect of the main appeal had indicated that he was satisfied with the ruling of Justice Gounder in rejecting the grounds of appeal against the conviction and therefore would proceed to canvass only the grounds of appeal against the sentence. At the hearing on 11 May 2016 the Appellant appeared in person and confirmed that he was not contesting the conviction. Therefore, I would only consider the grounds of appeal against the Appellant's sentences.

**Ground 1**

*The Learned Trial Judge had considered the Appellant's previous convictions as an aggravating factor to enhance the sentence.*

[10] It is on record that the Learned High Court Judge in paragraph 12 of his order had, under aggravating factors among 4 factors altogether set out therein, listed the following and added 03 weeks and 03 years on account of the combined 04 aggravating factors to enhance the sentences on first and second counts respectively .

*"The accused is adversely recorded with a total of 58 previous convictions of which 38 are valid pursuant to the Rehabilitation of offenders Act 1997."*

[11] In **Singh v State** Criminal Appeal No. AAU0004/97S decided on 12 February 1998; [1998] FJCA 6 the Court of Appeal laid down the position prior to the Sentencing and Penalties Decree, 2009 came into effect as follows

*"It is now well settled that a prisoner is not to be sentenced for the offence he has committed in the past and for which he has already been punished. In other words his sentence is not to be increased because of his earlier offending - see **O'Donnel v Perkins** 1908 VLR 537. As was said by the English Court of Appeal in **R v Queen** [1982] Crim. L.R. 56 the proper way to look at the matter is to decide a sentence which is appropriate to the offence for which the prisoner is before the Court and then to consider whether the Court can extend some leniency to the offender having regard among other things to his record of previous convictions."*

[12] In **Tuisavusavu v State** Criminal Appeal No. AAU0064 of 2004S decided on 03 April 2009; [2009] FJCA 50 prior to the Sentencing and Penalties Decree, 2009 came into force, the Court of Appeal held

*"Secondly, the sentencing judge used as an aggravating feature the fact that the 1st appellant had 14 previous convictions and the 2nd appellant one previous conviction. The common law is that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community. It seems to us that the sentencing judge has erred in using the appellants' prior criminal records as an aggravating feature."*

[13] In **Bargain Box (Fiji) Ltd v Fiji Commerce Commission** Criminal Appeal No: HAA 001 of 2012 decided on 30 March 2012; [2012] FJHC 1001, Gounder J said

*"The Sentencing and Penalties Decree codifies the principles of sentencing developed by the common law. Section 4 sets out the purposes for which sentencing may be imposed by a court and the factors that a court must have regard to when sentencing an offender. Section 5 sets out the factors to be considered in determining an offender's character."*

[14] The preamble to Sentencing and Penalties Decree, 2009 is as follows:

***"A DECREE TO MAKE COMPREHENSIVE PROVISION FOR THE SENTENCING OF PERSONS FOR CRIMINAL OFFENCES AND TO REFORM PROCESSES APPLICABLE TO THE PRESCRIPTION OF PENALTIES IN THE LAWS OF FIJI AND THE DETERMINATION AND ENFORCEMENT OF A RANGE OF SENTENCING OPTIONS IMPOSED BY THE COURTS, AND FOR RELATED PURPOSES."***

[15] Therefore it is clear that the Sentencing and Penalties Decree, 2009 was promulgated for a wider purpose than only codifying the common law principles on sentencing. In my opinion, in view of this legislation the common law principles developed by courts over the years on sentencing should be applied only in so far as they are caught up within the specific provisions of the Decree or not inconsistent with the provisions of said Sentencing and Penalties Decree, 2009 or where there is a lacuna in the said Decree to cater to a specific situation or to fill in gaps, if any, in the Decree or as persuasive guidance, where relevant, to interpret the provisions thereof.

[16] It appears that provisions in section 4 (2) (i) read with section 5 (a) of the Sentencing and Penalties Decree, 2009 have been interpreted in a number of judicial decisions. Section 4 (2) (i) prescribes that in sentencing offenders a court must have regard to the offender's previous character. Section 5(a) allows a court to consider *inter alia* the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender in determining the character of an offender.The contention of the Appellant is that the Learned Trial Judge could not have considered his previous convictions as an aggravating factor despite the above provisions.

[17] Gounder J. in **Wagalevu v State** decided on 10 October; [2010] FJHC 468 stated

> *"It is settled law that an offender should not be sentenced twice for the same offence. Therefore, it follows that when an offender is sentenced for a new offence, his previous convictions have limited relevance. An offender's previous convictions deprive him of any discount based on previous good character. Previous convictions cannot be used as a matter of aggravation to enhance the sentence for the new offence. To do so will be punishing the offender twice for the same offence."*

[18] Goundar J. again said in **Waini v State** Criminal Appeal No. HAA 006 of 2009 decided on 10 September 2009; [2009] FJHC 202

> *"It is settled law that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community (**Tuisavusavu & Savou v. State** Criminal Appeal No. AAU0064 of 2004S)."*
>
> *"The true question is one of appropriateness of the overall sentence, that is whether it reflects the totality of the criminality involved."*

[19] Similarly Madigan J. said in **State v Yasa** Criminal Case No: HAC44 of 2012 decided on 08 March 2013; 2013] FJHC 101

> *"Detail of an offender's previous record is not for the purposes of meting out additional punishment if he has committed the same crime before; it is to prove for or against the instant offender whether he is of good character or not. A person with a completely clear record will be afforded some discount in regard to that fact because the presumption must be that he has never come to the attention of the authorities before and is therefore of good character."*

[20] I am inclined to agree with the above sentiments on what purpose previous convictions should be used in the matter of sentence as they could be accommodated within the 'current sentencing practice' under section 4(2) (a) of the Sentencing and Penalties Decree, 2009. Thus, it is clear that the Learned High Court Judge was wrong to have categorised and considered the Appellant's previous convictions under aggravating factors. However, it is equally clear that the Appellant was liable to forfeit any discount or leniency he would

otherwise have been entitled to on account of the long list of previous convictions adversely affecting his character.

[21] Now the question is whether this court should interfere with the sentence imposed on the appellant by the Learned High Court Judge on account of the aforesaid error. I do not think so. Saleem Marsoof J. in the Supreme Court said in **Quari v State** Criminal Petition No. CAV 24 of 2014 decided on 20 August 2015; [2015] FJSC 15

> *"In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence."*

[22] I agree. The ultimate object of the Sentencing and Penalties Decree, 2009 coupled with the judicial guidelines is to help judges arrive at a just and fair sentence proportionate to the gravity of the offence for an accused considering all the circumstances of the case while maintaining an acceptable degree of uniformity and consistency. It is not to insist on a straightjacket approach to sentencing. Mathematical accuracy is not what is expected in sentencing.

[23] The Appellant's conduct in attempting to strike the Learned Trial Judge with a projectile, namely a concrete fragment, hearing the case of murder against him in the course of the judicial proceedings with intent to cause grievous harm is, to say the least, deplorable and to be utterly condemned. The Irish Times had reported a similar incident that had happened as recently as on 11 December 2015 where Judge Miriam Walsh hearing a domestic violence order case at Dolphin House in Temple Bar in Dublin had been allegedly punched her in the head, knocking her to the ground and kicked repeatedly by the angry Respondent when Judge Walsh granted the safety order, for five years against him, resulting the judge being hospitalised. In the United States in December 2008, a man

had been sentenced to seven life terms for shooting and killing a Georgia superior court judge and other personnel in an Atlanta courthouse. Such incidents are reported from time to time from around the world.

[24] This kind of assaults or even attempts cannot be regarded only as personal attacks on the individual judges but rather against the whole system of administration of justice and are calculated to intimidate and instil fear among other judges as well. They have the effect of lowering the esteem and confidence of the institution of judiciary in the eyes of the public at large. There must be an environment where a judge should be able to function, hear cases and make orders in court houses without fear of physical attacks. Such tendencies should not be allowed to take a foothold in Fiji and should be nipped in the bud.

[25] Therefore, considering all the circumstances of the case I am not inclined to interfere with the sentence imposed on the Appellant as one of the purposes of sentencing is to deter offenders or other persons from committing same or similar offences. I think even when his previous convictions are disregarded as an aggravating factor still the sentence of 08 weeks and 05 years on count 1 and 2 respectively are fully justified. The sentences have not caused any substantial miscarriage of justice to the Appellant and I reject this ground of appeal.

**Ground 2**

*The Learned Trial Judge had erred in ordering the sentences on count 1 and 2 to run consecutively to the Appellant's existing sentence of life imprisonment.*

[26] The Respondent argues that the Learned Judge was justified in making the sentences imposed on the Appellant on count 1 and 2 to run consecutively to his life imprisonment on the strength of 'totality principle' in sentencing. It has cited the decisions in cases of

**Mill v The Queen**[1] [1988] HCA 70, **Knight** [1981] 26 SASR 575, **Tuibua v The State** Criminal Appeal No. AAU0116 of 2007S decided on 07 November 2007; [2008] FJCA 77 and **Taito Rawaqa v The State**Appeal No. AAU 009 of 2008 decided on 08 April 2009; [2009] FJCA 7.The decision in **Vukitoga v State** Criminal Appeal No. AAU 0049 of 2008 decided on 13 March 2013; [2013] FJCA 19 is yet another example where the 'totality principle' doctrine has been recognised.

[27] In **Tuibua v The State** (supra) it was held

*"The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. A sentencer who imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentence must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced* ***(Mill v The Queen*** *[1988] HCA 70; (1988) 166 CLR 59; R v Stevens (1997) 2 Cr.App.R. (S.) 180).When a sentencer imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentencer should also consider the propriety of the aggregate sentence taken as a whole (R v Jones [1995] UKPC 3; (1996) 1 Cr.App.R. (S.) 153,* ***R v Millen*** *(1980) 2 Cr.App.R. (S.) 357 and* ***Nollen v Police*** *(2001) 120 A Crim R 64."*

[28] While I have no difficulty in understanding the rationale behind the 'totality principle', I am afraid that those decisions shed little light on the situation we are confronted with in the present appeal. Because, in none of the above cases had the courts dealt with a situation where the prisoner was already serving a life sentence. The Sentencing and Penalties Decree, 2009 is also silent regarding a situation like the one we are faced with. I have not been able to find any previous decision of this Court or the Supreme Court dealing with a similar situation. Nor have the parties brought to the notice of such a decision to us. Therefore, I had to have recourse to common law principles in different jurisdictions to resolve this issue.

[1]166 CLR 59, 83 ALR 1 & 26 Crim R 468

[29] I think the answer lies in the Court of Appeal decision in **R v Foy** [1962] 2 All ER 246 where John Patric Foy appealed against the conviction of (i) counts of office-breaking and larceny and (ii) robbery with violence and also against his sentence of 14 years imprisonment concurrent to each count, these sentences to run consecutively to a life imprisonment imposed on him on 23 March 1959. Lord Parker C.J. said

> *"..... the court would like to say that they are quite satisfied that the sentence which the learned judge purported to pass in the present case was not a valid sentence. Life imprisonment is imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on licence,and the sentence of life imprisonment remains on them until they die. Accordingly, if the court makes any period of years consecutive to life, the court is passing a sentence which is no sentence at all in that it cannot operate until the prisoner dies. ..... In this case, it is right for them to say that the sentence passed was wholly invalid, and that the proper sentence would have been one of fourteen years' imprisonment concurrent with the sentence of life imprisonment."*

[30] Hammond J. in **R v McElroy** [1993] 3 NZLR 192 where the trial judge considered the option of imposing sentences for sexual violation, arson and manslaughter cumulative upon the mandatory life sentence for murder, followed **R v Foy** (supra) and **R v Haunui and Greening** [1992] 8 CRNZ and held that there was no power for a Court to impose cumulative sentences on a sentence for life imprisonment for murder and to do otherwise would be a logical impossibility.

[31] However, Hammond J. went onto point out an anomalous situation that could arise from this legal position by the following example

> *"Assume X rapes Y on 1 January 1993 and (having pleaded guilty) is sentenced on 1 March 1993 to seven years' imprisonment. Whilst in prison, on 1 May 1993 he kills a prison officer. As the law presently stands, this prisoner could be sentenced to life imprisonment cumulative on the rape sentence. The inexorable logic of Parker LCJ would not apply in this case.*
>
> *It is a fundamental principle of justice that it should be even handed. Like cases should be treated alike. Why then, if prisoner X kills a policeman and is sentenced to life imprisonment; and then subsequently rapes a female*

*prison officer whilst in prison or escapes and rapes some other women, should the result be different?"*

[32] Hammond J. also went on to record the problem of escaping prisoners who have been sentenced to life imprisonments who commit further crimes whilst at large knowing that the law cannot impose further finite sentences on them and may act dangerously with regard to the members of the public.

[33] The third issue raised by Hammond J. concerns a prisoner who is sentenced to life imprisonment, hurling abuse at the court and all connected with it and the court cannot even pass a cumulative sentence of contempt to maintain the integrity of its own processes. The Learned Judge then suggests that at present what happens to such offenders is simply a matter for the Parole Board.

[34] In my view, all three matters raised by Hammond J carry a considerable weight and perhaps deserve the attention of the executive and the legislature. Giving the court power to impose cumulative sentences or to subsequently extend the minimum term to be served before pardon may be considered, in case the prisoner serving a life imprisonment is subsequently found guilty and sentenced for a different offence or offences are perhaps, some areas to be looked at.

[35] The Respondent had urged this Court to declare the Appellant as a habitual offender under the Sentencing and Penalties Decree, 2009. This application should have been made before the trial judge who could have considered the material and made an appropriate order. I do not think that this is the correct forum to make this application for the first time at the hearing of the Appellant's appeal.

[36] Therefore, I conclude that the Learned Trial Judge's decision to order the sentences to run cumulatively or consecutively to the Appellant's life imprisonment is wrong and should be varied by making an order to run the sentences on count 1 and 2 concurrently to the sentence on life imprisonment. Accordingly this ground of appeal is allowed.

**Ground 3**

*The combination of the above two grounds had resulted in an excessive sentence on the Appellant.*

[36] In **Koroicakau v The State** Criminal Appeal No. CA0006 of 2005S decided on 04 May 2006; [2006] FJSC 5 the Supreme Court observed

> *"When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process"*

[37] In **R v Radich** [1954] NZLR 86 the New Zealand Criminal Court of Appeal said

> *"... one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment."*
>
> *"If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences."*
>
> *"The Court of Appeal , in considering an application for reduction of sentence, must be reasonably satisfied that the sentence is manifestly excessive or wrong in principle, or there must be exceptional circumstances calling for its revision".*

[38] **R v Goodrich** (1955) 72 WN (NSW) 42 and ***R* v AEM** [2002] NSWCCA 58 are subsequent cases that had followed the principle in **R v Radich** (supra). **Tevita Jone**

**Rami v. Reginam [Supreme Court, 1963] (Macduff C.J) F.L.C. p.69** also quoted **R v Radich** (supra) with approval. In Fiji **Prasad v The State** Criminal Appeal No. HAA0032 of 1994 decided on 30 September 1994; [1994] FJHC 132 and **Turuturuvesi v State** High Court Criminal Appeal No: HAA006 of 2011decided on 13 July 2011; [2011] FJHC 384 have followed **R v Radich** (supra) and **Tevita Jone Rami v. Reginam** (supra).

[39] The Respondent has cited to this court several decisions to indicate that tariff for an offence under section 255 of the Crimes Decree is between 6 months to 05 years with the maximum sentence of life imprisonment. The Trial Judge had started with 03 years.

[40] The Respondent had also urged this Court to enhance the sentence but it had not been urged before the Trial Judge and no cross appeal had been lodged on the inadequacy of the sentence by the Respondent. I do not think that, therefore, it is appropriate for this Court to consider that request.

[41] Having considered this ground of appeal in the light of the above decisions I am convinced that there is no justifiable reason for this Court to interfere with the sentence imposed by the Learned High Court Judge. I have also reminded myself of the following observations.

[42] In **Veen v The Queen (No 2)** [1988] 164 CLR 465 Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

> *"... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence*

*in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."*

[43] In **R v Engert** [1995] 84 A Crim R 67 Gleeson CJ said at 68 after discussing **Veen v The Queen (No 2)** (supra):

> *"A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. ...*
>
> *It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."*

[44] The sentences do not violate the principle of proportionality. Nor are they excessive. There are no exceptional circumstances for this Court to revise them. I reject this ground of appeal.

**Ground 4**

[45] The Written Submissions of the Respondent state that, the Appellant had urged a fourth ground of appeal which is that the Learned High court Judge had failed to deduct for his early guilty plea.

[46] It has been a well recognized practice in common law to take into account a plea of guilty in the sentence. Most common law jurisdictions have codified the practice in sentencing statutes. In Fiji, the practice is part of the common law (vide **Daunabuna v State** Criminal Appeal No. AAU0120 of 2007 decided on 04 December 2009; [2009] FJCA 23). In **Koroi v. State** Criminal Appeal No. AAU0037 of 2002S decided on 14 February 2003; [2003] FJCA 7, the Court of Appeal said:

*"It has long been the practice of the courts to reduce a sentence where the accused person has pleaded guilty. In most cases that is a recognition of his contrition as expressed by an early admission and the fact that it will save the witnesses and the court a great deal of time and expense.."*

[47] - The weight to be given to a guilty plea depends on a number of factors. Some of these factors were identified by Hunt CJ at CL in **R v. Winchester** (1992) 58A Crim R 345 at 350:

*"A plea of guilty is always a matter which must be taken into account when imposing sentence. The degree of leniency to be afforded will depend upon many different factors. The plea may in some cases be an indication of contrition, or of some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prisoner has pleaded guilty. The extent to which leniency will be afforded upon this ground will depend to a large degree upon whether or not the plea resulted from the recognition of the inevitable: Shannon (1979) 21 SASR 442 at 452; Ellis (1986) 6 NSWLR 603 at 604. The plea of guilty may also be taken into account as a factor in its own right independently of such contrition, as mitigation for the co-operation in saving the time and cost involved in a trial. Obviously enough, the extent to which leniency will be afforded upon this ground will depend to a large degree upon just when the plea of guilty was entered or indicated (and thus the savings effected): Beavan (unreported, Court of Criminal Appeal, NSW, Hunt, Badgery-Parker and Abadee JJ, 22 August 1991), at p.12".*

*"Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed. That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown"*

[48] In this case the record reveals that though the Appellant had indicated that he would plead guilty when the Amended Information was served on 20 June 2012, on 01 August 2012 he wanted charges amended and then objected to a Sri Lankan Judge hearing the case. The on 02 August 2012 charges were read over and he withdrew his refusal application and pleaded guilty.

[49] I tend to believe that his plea resulted more from the recognition of the inevitable rather than anything else. In any event the Learned High Court Judge had considered his plea of

guilt prior to the commencement of the case as a mitigating circumstance though he had not shown a precise period as having been allowed.

[50] I do not think that there is merit in this ground of appeal and I would reject it.

***The Orders of the Court are:***

1. *Appeal against conviction is dismissed.*
2. *Appeal against sentence is allowed.*
3. *Sentences imposed on Count 1 and Count 2 are to run concurrently with the Appellant's sentence of life imprisonment.*

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**Hon. Mr. Justice W. Calanchini**
**PRESIDENT, COURT OF APPEAL**

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**Hon. Mr. Justice S. Gamalath**
**JUSTICE OF APPEAL**

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**Hon. Mr. Justice C. Prematilaka**
**JUSTICE OF APPEAL**