IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 040 of 2017
[Magistrates Court Criminal Case No. HAC 886 of 2011]

BETWEEN

: **JOELI TAWATATAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **14 May 2020**

Date of Ruling : **20 May 2020**

RULING

[1] The appellant along with Leone Vakarusaqoli (the appellant in AAU 0032 of 2017) had been indicted in the High Court but tried in the Magistrates court in Nausori under extended jurisdiction on a single count of robbery contrary to section 311(1)(a) of the Crimes Decree and one count of resisting arrest contrary to section 277(a) of the Crimes Decree, 2009. The charges against the appellant were as follows.

> '***Count one***.
>
> ***Aggravated Robbery***, *contrary to Section 311 (1)(a) of Crimes Decree Number 44 of 2009.*
>
> *The* ***Particulars of Offence*** *is that:*

*"**Joeli Tawatau and Leone Vukarusaqoli** on the 31st day of March, 2011, at Naduru Road, Nausori in the Central Division, immediately before committing theft, used force and robbed Ravin Prasad of assorted jewelleries valued $9500.00 cash $200.00, one easy-telephone valued $90.00, one nokia phone valued at $50.00, one Samsung mobile valued at $2000.00 and all to the total value of $12140.00."*

Count two

***Resisting arrest**, contrary to Section 277 (a) of the Crimes Decree.*

*The **Particulars of the offence** is that:*

"Joeli Tawatatau on the 31st day of March 2011 at Tacirua in the Central division resisted lawful apprehension."

The High Court pursuant to Section 4 (2) of the Criminal Procedure Decree 2009 extended the jurisdiction of this Court to try this case.'

[2] After trial, the learned Magistrate found the appellant guilty in his judgment dated 27 June 2016. The appellant was sentenced on 29 May April 2017 to imprisonments of 10 years with a non-parole period of 09 years on the first count and 09 months on the second count and both sentences were directed to run concurrently.

[3] The appellant had apparently appealed against conviction within time but had been informed by the High Court that it was premature and he had been advised to appeal after the sentence was imposed. Why the learned Magistrate had taken such a long time since the judgment to sentence the appellant is said to be due to the court's ruling pending on the appellant's application for arrest of judgment. However, his current appeal against conviction and sentence is out of time. The appellant had also filed an application for bail pending appeal. Legal Aid Commission appearing for the appellant had filed an amended notice of appeal against conviction (03 grounds of appeal) and sentence (one ground of appeal) along with applications for enlargement of time and bail pending appeal with two supporting affidavits and written submissions. The State had indicated in its written submissions dated 05 May 2020 that since the appellant had filed his appeal against conviction within time it would not object to the enlargement of time on the basis of delay. Therefore, I would treat

the appellant's application as a leave to appeal application in respect of both conviction and sentence.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87. This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled. In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court following the decisions in **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011 set out the sentencing errors that could trigger the leave to appeal decision. The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. For a ground of appeal against sentence in a timely appeal to be considered arguable there must be a reasonable prospect of its success in appeal. The said guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[6] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*"[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013: 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
>
> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
>
> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> > *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
> >
> > *(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."*
>
> *[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR*

28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal****. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others -v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the appeal. That as was pointed out in Koya's case (****Koya v The State*** *unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[8] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[9] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[10] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[12] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [Also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for **bail pending appeal** should attempt even to comment on. They are matters for the Full Court ... ."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *"The general restriction on granting **bail pending appeal** as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional*

circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."

[14] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success' then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them he cannot then obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

Grounds of appeal

[17] The grounds of appeal urged by the appellant are as follows.

Appeal against Conviction

Ground One

'THE Learned Resident Magistrate erred in law and fact when he considered the admissions of the appellant's co-accused in his judgment and considering the admissions of the appellant's co-accused as part of the evidence that led the learned Magistrate to convict the appellant'.

Ground Two

THE Learned Resident Magistrate erred in law and fact when he failed to properly assess the lack of evidence on the identification of the Appellant and convicting the Appellant with no identification evidence at all which was improper and raises an arguable error made by the Learned Magistrate.

Ground Three

The Learned Resident Magistrate erred in law and fact when he failed to properly assess the evidence of recent possession

Appeal against Sentence

Ground Four

The non-parole period set by the Resident Magistrate is too close to the head sentence thus making the sentence harsh and excessive and not in line with the principles of rehabilitation.'

01st ground of appeal

[18] The appellant's complaint under appeal ground 01 is based on the following paragraph of the judgment of the Magistrates court where the appellant was the 01st accused.

'The caution interview of the 2nd accused which was admitted in evidence after the voir dire details the robbery, the actions of the 1st accused and the role of the 2nd accused. The evidence in Court by the prosecution witnesses is a series of links, which form the chain of evidence. The evidence of the prosecution witnesses ties together. There are no gaps in the evidence which do not link up and complete the chain. This Court accepts the evidence of the prosecution witnesses. All the elements of the offence the accused are charged with are proven by the prosecution.

[19] The argument of the appellant is that the above paragraph shows that in convicting the appellant the learned Magistrate had entertained in his mind the admissions of the co-accused made in his cautioned interview and used what the co-accused had told there against the appellant.

[20] There is clearly merit in the appellant's submission that a reference made in a caution statement by one accused cannot be made use of against another accused and each accused's case should be assessed separately [vide **Baleilevuka v State** [2019] FJCA 209: AAU58.2015 (3 October 2019) and **Nalave v State** [2019] FJCA 27: CAV0001 of 2019: 01 November 2019]. In **Baleilevuka** the Court of Appeal held:

> *'It is trite law that a reference made in a caution statement by one accused cannot be made use of against another accused. It is also trite law that if an accused while testifying on oath at the trial implicates another accused that will be evidence against the other accused. It may be in the form of an admission that he committed the crime along with the other accused or it may be in the form of a 'cut-throat defence' (**R V Turner & Others** [1979]70 Cr App R 256; **R V Varley** [1982] Cr App R 242; **Bannon V Queen** [1995] 185 CLR 1) where he implicates the other accused in the crime exonerating himself. It is my view that where an accused corroborates the evidence of another accused or gives evidence favourable to any of the other accused; that is also evidence that must be considered by the Assessors and the trial Judge in coming to a finding against the accused.'*

[21] However, the impugned judgment also reveals that the following evidence had been led by the prosecution.

> *'There was no direct evidence of identification of any accused person. The victim told the Court he could not identify them as they were masked and it was dark. The victim told the Court that on 31st March 2011 some people broke into his house at around 2 to 2.30am and assaulted him and he fell, his mouth was covered with masking tape. The victim told the Court of the things and the approximate value of items stolen by the persons who broke into his house. The Court is satisfied from the evidence of the victim of the date and the items and its value that was stolen from his house. A company vehicle was also taken from his residence. There is no doubt by this Court that the items belonged to the victim and that the company vehicle was in the victim's possession.*
>
> *The evidence of Police Officer Timoci Bola (PW-1) was that he was on mobile patrol with other officers and spotted the 1st accused at Tacirua. The company vehicle of the victim was found abandoned at Cunningham, not far from Tacirua. PW-1 saw Joeli, the 1st accused and asked to search his bag when the*

1st accused threw the bag and ran off. The 1st accused was later arrested and a search of the bag revealed a number of items, which included jewellery, number plate, a phone. The witness identified those items in court. PW-1 also identified the 1st accused as the person they arrested and the person who had the bag with him the day he was arrested. The items and the bag found with the 1st accused belonged to the victim.'

[22] Thus, the main evidence against the appellant had been the fact that he was found in possession of a bag containing all or some of the stolen items from the complainant's house within a few hours of the robbery at a place not far from where the car taken away from the complainant's premises was seen abandoned and his conduct of having run away when the police wanted to search the said bag the appellant had with him.

[23] The learned Magistrate had narrated the appellant's defence at the trial as follows

'The 1st accused denied the allegation and that he had any bag with him when he was confronted by the police. His version is that the police assaulted him and told him to admit to the robbery. He was taken to Police Station and also later taken to hospital. One of the witnesses for the 1st accused was Jonetani he told the Court that he was with the 1st accused on the evening of 30th March 2011 they had a drink and he knocked out at 11pm and after that he did not know where the 1st accused was. The allegation of the robbery by the victim was at around 2 to 2.30 am on 31st March 2011

[24] Thus, it is clear that if the prosecution evidence was believed it was open to the learned Magistrate to convict the appellant on the evidence independent of having had any recourse to his co-accused's confession. The Magistrate had expressly believed the prosecution witnesses and obviously not believed the appellant or his witness.

[25] The counsel in oral submissions stated that the chain regarding the so-called stolen items was not established by the prosecution in that there was no proof by way of a search list or any other records maintained at the police station that the police had in fact recovered the lost items from the appellant. Therefore, it was submitted that no inference of guilty could be drawn against the appellant on the legal premise of recent possession.

[26] However, without the benefit of the full appeal record I am not in a position to evaluate the aforesaid submission by the appellant's counsel. At this stage having the benefit of only the impugned judgment it is clear that there was enough evidence against the appellant to bring home the charges of robbery and resistance to arrest.

[27] Hence, my conclusion that there is no reasonable prospect of success in this ground of appeal and leave to appeal should be refused.

[28] Therefore, refusal of leave to appeal should lead to the logical conclusion that this ground of appeal does not have a very high likelihood of success as required for bail pending appeal.

02nd and 03rd grounds of appeal

[29] Under these interconnected or even overlapping two grounds of appeal the appellant challenges the identification of the appellant and the failure on the part of the trial judge to evaluate the evidence of recent possession because it is mainly the evidence of recent possession that connects the appellant with the robbery and establishes his identity. The importance of establishing the identity of the accused need not be overemphasised (see ***Nalave***). Having stated that there was no direct evidence of identification of the appellant and his co-accused, the trial judge had dealt with *inter alia* the evidence of the two police officers regarding the appellant having been in possession of the bag which contained lost items from the complainant's house (within hours of the robbery). Dealing with the evidence of the police officers, the learned judge had said that they identified the items recovered and the said items and the bag belonged to the complainant. Thus, it is possible that the complainant may have identified those items at the trial but there is no affirmative statement to that effect in the judgment. This aspect could be looked into only with the availability of the complete appeal record.

[30] Therefore, at this stage I am unable to conclude that there was no identification of the robbed items by the complainant at the trial but the doubt about it at the leave stage alone is not a good enough reason for granting leave to appeal or to decide that there

is a very high likelihood of success before the Full Court as stated in ***Qurai***. Had there been a proper identification of those items by the complainant at the trial, the circumstances in which he was found in possession of them would establish the nexus between the appellant and the robbery and lead to the conclusion that he in fact participated in the robbery.

[31] It is also argued on behalf of the appellant under the third ground of appeal that the learned Magistrate should not have placed reliance on 'recent possession' evidence following ***Baleilevuka***. However, whether evidence of 'recent possession' should be acted upon or not is essentially an exercise involving the evidence of each case and I cannot and need not go into that issue at this stage. Yet, as I have stated earlier from the impugned judgment it appears that there was reason for the trial judge to have acted upon such evidence. The appellant also submits that the 'resisting arrest' charge was a fabrication to cover-up the police assault on the appellant with a view to compelling him to confess to the robbery. However, no confessionary statement in respect of the appellant had been sought to be led in evidence by the prosecution.

[32] Therefore, I cannot conclude that there is a reasonable prospect of success in his appeal to be granted leave to appeal and consequently his appeal on this ground has not reached the threshold of 'very high likelihood of success' required for bail pending appeal.

04th ground of appeal

[33] The appellant complains that the non-parole period is too close to the sentence thus making the sentence harsh and excessive and the non-parole period denies him the chance of rehabilitation.

[34] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal examined a similar argument extensively having considered all previous authorities on this matter. The issue before court and its observations were stated as follows.

'[89] The Learned Trial Judge while sentencing the Appellant to 17 years imprisonment had fixed the period during which he is not eligible to be released as 16 years in terms of section 18(1) of the Sentencing and Penalties Decree. Section 18(4) states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 16 years fixed by the Trial Judge is in compliance with section 18(4)'

*[90] However, the complaint of the Appellant is that the non-parole period of 16 years has the effect of denying or discouraging the possibility of rehabilitation and is inconsistent with section 4(1) of the Sentencing and Penalties Decree and the decision in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20.'*

*'[114] The Court of Appeal guidelines in **Tora** and **Raogo** affirmed in **Bogidrau** by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[35] The maximum sentence for aggravated robbery under section 311(1)(a) of the Crime Decree, 2009 is 20 years. The tariff applicable to the offence of aggravated robbery in the form of a home innovation in the night with accompanying violence perpetrated on the inmates as in the current case was set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) as 08-16 years of imprisonment.

[36] The learned Magistrate though not referring to ***Wise*** had taken 09 years as the starting point and after adjusting for aggravating and mitigating factors he had arrived at the final sentence of 10 years imprisonment with a non-parole period of 09 years for robbery which is a legal sentence in every sense.

[37] It appears that the trial judge had not fixed the lower starting point with the objective seriousness of the offence in mind (vide **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). He seems to have wanted to limit the ultimate sentence to 10 or less number of years of imprisonment. Therefore, the appellant cannot complain of the non-parole period of 09 years which perhaps reflected the unspoken thinking on the part of the learned Magistrate for the sentence at this lower end to carry an element of deterrence.

[38] In **Singh v State** [2016] FJCA 126; AAU009.2013 (30 September 2016)the Court of Appeal remarked

> *'I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.'*

[39] When an appellant receives a less than usually low sentence he is not entitled to complain about the short gap between the head sentence and the non-parole period, for the requirement for rehabilitation is assumed to be inbuilt in the head sentence. In any event, the Full Court may revisit the sentence in the light of section 23(3) of the Court of Appeal Act if and when it comes up before it for determination in due course.

[40] Coming back to the appellant's complaint, in **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> *"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case****."*
>
> *'.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[41] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

> *"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[42] The arguments taken up earlier based on the calculation of remission *vis-à-vis* the non-parole period have been put to rest by the Corrections Service (Amendment) Act 2019. It states

> *"**2.** Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*
>
> *"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.*
>
> *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.".*
>
> *Consequential amendment*
>
> ***3.** The Sentencing and Penalties Act 2009 is amended by—*
>
> *(a) in section 18—*
> *(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and*
> *(ii) deleting subsection (2); and*
>
> *(b) deleting section 20(3).*

[43] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in

operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

[44] The changes introduced by the Corrections Service (Amendment) Act 2019 to the non-parole regime are in accord with the decisions in ***Natini*** and ***Raogo***. However, the amendment has negated the following aspects of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22

> (i) *fixing a non-parole period is quite a drastic power and to make it reasonable, it should be exercised by a Court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. (per Lokur,J)*
>
> (ii) *The power to fix a non-parole period should be exercised by the Courts in exceptional cases and circumstances and where it is absolutely necessary to do so and when that power is exercised it must be preceded by a hearing and supported by reasons. (per Lokur,J)*

[45] Corrections Service (Amendment) Act 2019 on the other hand has affirmed the following direction by the Supreme Court in ***Timo***

> *'The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court and the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period ought to be discontinued forthwith. (per Lokur,J)*

[46] Gates, J remarked in ***Timo*** as follows

> *'judicial officers need to justify the imposition of non-parole periods close to the head sentence, or*
>
> *indeed for the decision not to impose one at all,*
>
> *for section 18(1) speaks in terms of "must fix a period..." (per Gates,J)*

[47] Corrections Service (Amendment) Act 2019 has left the first part of the above observation intact while it has clearly rendered the second part irrelevant. The last comment on section 18(1) of the Sentencing and Penalties Act 2009 has been affirmed by the amendment.

[48] Therefore, I hold that the gap of 01 years between the final sentence and the non-parole period cannot be said to violate any statutory provisions or is obnoxious to the judicial pronouncements on the need to impose a non-parole period. The 01 year gap in this case is not too close to the head sentence and justified given the facts and circumstances of the case against the appellant.

[49] This ground too has no reasonable prospect of success to be given leave to appeal. Nor does it have a 'high likelihood of success' to consider bail pending appeal.

[50] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

[51] Before parting with this ruling, I feel constrained state as an observation that given the fact that this case was an aggravated robbery involving home invasion in the night with accompanying violence, it should not have been referred to the Magistrates court to try the appellant under its extended jurisdiction. The High Court judges should exercise more care and vigilance in investing the magistrates with jurisdiction to try indictable offences under section 4(2) of the Criminal Procedure Act, 2009.

Order

1. Leave to appeal against conviction and sentence is refused.
2. Bail pending appeal is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL