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

CRIMINAL APPEAL NO. AAU 144 of 2019
[High Court Criminal Case No. HAC 91 of 2015]

BETWEEN : **ROPATE NAISUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga JA
Qetaki JA

Counsel : **Appellant in Person**
Mr. R. Kumar for the Respondent

Date of Hearing : **3 July 2023**

Date of Judgment : **27 July 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Mataitoga, JA and agree with the orders proposed.

Mataitoga, JA

Background

[2] The appellant, Ropate Naisua with 3 others were charged in the High Court of Suva on three counts of Robbery with Violence, contrary to section 293 (1) of the Penal Code and one count of unlawful use of motor vehicle contrary to section 292 of the Penal Code. Co-accused Iowane Salacakau was charged and convicted with two counts of Robbery with Violence, and the Unlawful Use of a Motor Vehicle. The appellant and his co-accused were convicted of all the charges brought against them.

[3] The appellant was sentenced to 13 years imprisonment with a non-parole period of 11 years.

[4] One of the co-accused was Iowane Salacakau. He unlike the appellant was convicted of 2 counts of Robbery with Violence and one count of Unlawful Use of Motor Vehicle. He was not charged with the Robbery with Violence count that involved a home invasion of Mr Stephen John Paul. He was sentenced to 7 years imprisonment with non-parole period of 6 years. I single out Iowane Salacakau from the other co-accused because it was his sentence that was used by the appellant to raise the argument of disparity in sentence raised by the appellant.

[5] Another co-accused of the appellant, is Serevi Vananalagi and received exactly the same sentence as the appellant. They were charged and convicted on the four counts Robbery with Violence, the first count involving violent robbing of Stephen John Paul at his home situated at Waimanu Road, Suva. For this count of Robbery with Violence this co-accused was sentenced to a total of 13 years of imprisonment with non-parole period of 11 years. His sentence is exactly the same as that of the appellant.

[6] The above facts are critical to the issues raised by the appellant in this appeal, namely disparity in sentence between the appellant and co-accused Iowane Salacakau. It also obviates that the comparison with Iowane Salacakau was not the right one, the correct comparator in terms of crime committed and sentence ordered is Serevi Vananalagi.

Court of Appeal

[7] The appellant had lodged an appeal against conviction and sentence. The appeal against conviction was dismissed by the Court of Appeal and later by the Supreme Court on 26 August 2016. Once the appeal against conviction was exhausted, the appellant started this process of leave to appeal against sentence. The leave ruling for appeal against sentence was dismissed by the Judge Alone. Soon thereafter the appellant submitted a Renewal Notice to the court registry on 30 April 2020. Section 35(3) of the Court of Appeal Act states:

> *"if the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favor, the appellant may have the application determined by the court as duly constituted for hearing and determining of appeal under this Act."*

[8] The appellant submitted three grounds of appeal in the Renewal Notice of Appeal. Before the hearing of this appeal the grounds of appeal, were reduced to two.

Grounds of Appeal

[9] This is a timely renewal Notice of Appeal submitted by the appellant for his appeal against sentence. There are two grounds of the appeal

> *(i) the appellant's remand period of 18 months while awaiting trial was not taken into consideration in the final computation of the sentence to be served;*
>
> *(ii) There is a violation of the principle of parity in sentence when sentencing appellant, because the co-accused Iowane Salacakau who have been found guilty of the same offences was given a lower sentence of 7 years imprisonment compared to from the 13 years imposed on the appellant.*

Was credit given by the Trial Judge in computing the final sentence, for 1 year 8 months the appellant was in remand while awaiting trial?

[10] Section 24 of the Sentencing & Penalties Decree 2009 states:

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

[11] The statute law is clear, time spent in remand must be deducted from the final sentence to be imposed. The issue in this case is the inclusion of the remand period during trial as part of the mitigation factors that the court took into consideration. Is this proper, given the fact that remand period is "shall be regarded by the court as a period of imprisonment already served by the offender." It seems to me those words, would dictate that the remand period must be deducted from what is left in the computation of the sentence, after the aggravating, mitigation factors etc have been taken care off. The remand period should then be deducted, before the final sentence is arrived at, for it is standalone category of factors to be taken into account when finalising sentence

[12] The words *"... unless a court otherwise orders ..."* in section 24 of the Sentencing & Penalties Decrees 2009 is there to ensure that if the court does not wish to follow the purport of the provision, then it needs to make an order and provide the reasons for making the said order. This encourages transparency, fairness and accountability in decision making that may impact the liberty of an accused person.

[13] In terms of caselaw the following are relevant in supporting this principle of sentencing:

(i) In **Koroitavalena v State [2014] FJCA 185**, the Court of Appeal stated:

"Section 24 provides:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the Court as a period of imprisonment already served by the offender."

[20] This section mandates the trial Judge to deduct the period that an accused is held in custody prior to the trial when imposing a sentence. However, if the trial Judge is of the view that such period should not be so deducted, he should give reasons for not doing so.

[21] It was argued by Counsel for the Respondent that the period of remand in the present case had been taken into account in considering the mitigating factors. It was further argued that if the time spent in

custody is not substantial then there is no arguable error if it is subsumed in the mitigating factors.

[24] *The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors as argued by the Respondent. The period being not substantial has no effect in giving effect to the provisions of section 24."'*

[14] In applying the above law and principles to the facts of this case, it is clear that for the appellant's sentence, the trial judge in sentencing him stated: **See: Page 3 Sentence Ruling dated 9 September 2011.**

"Ropate, you are 22 years old, married (defacto) with two kids. You have been remanded in custody for 1 years 8 months.

I sentence you as follows:

(i) *Count 1, I start with a sentence of 8 years imprisonment. For aggravating factors; I add 7 years, making a total of 15 years imprisonment. For mitigating factors, I deduct 2 years, leaving a balance of 13 years"*

In addition to the above, a non-parole period of 11 years was also ordered. This was exactly the same sentence ordered for Serevi Vananalagi the other co-accused who was convicted for the same 3 counts of Robbery with Violence, which includes the 1 count of home invasion.

[15] From the above review of the sentencing ruling it is clear that 2 years was given for mitigation factors which were not stated. It is also clear that the 1 year 8 months of the remand period was not deducted, unless one takes the 2 years for the mitigating factor as the period of remand of the appellant. In the absence of any explanation of what were the mitigating factors for which 2 years were granted, it has to be assumed that it was not the remand period of the appellant, because on the basis of the principle of sentencing in **Koroitavalena** (supra) the remand period should not be subsumed into the mitigation factors. This uncertainty must be resolved in favour of the appellant. The only fair conclusion is that the head sentence must be varied to take into account the period of 1 year 8 months, the appellant spent in remand.

[16] In light of the above and in exercise of the powers of this Court in Section 23(3) of the Court of Appeal Act, the amended sentence shall be 12 years 4 months and the non-parole period will be 10 years effective from 4 September 2011. The court will make the appropriate order to bring this change in amending the sentence of the appellant.

Claim of Disparity of Sentence

[17] The second ground of appeal states:

> *(ii) There is a violation of the principle of parity in sentence when sentencing appellant, because the co-accused Iowane Salacakau who have been found guilty of the same offences was given a lower sentence of 7 years imprisonment compared to from the 13 years imposed on the appellant.*

[18] What is the principle of parity in sentencing? The parity principle is based on the concept that like cases should be treated alike in sentencing and different cases differently: **Green v The Queen** (2011) 244 CLR 462; **Lowe v The Queen** (1984) 154 CLR 606. Ordinarily, related offenders should be sentenced at the same time by the same judge. That a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[19] In **Wise v The State** [2014] FJCA 184, the court referred to:

> "[25] *Archibald*, [1997] part 5-106 page 597 States thus;
>
> > *"Disparity of sentence may occur in a number of different forms. The most obvious is where one co-defendant receives a more severe sentence than the other, when there is no good reason for the difference (**R v Church**, 7 Cr. App. R (S.) 370 C.A. There may equally be disparity when the defendants receive identical sentences, despite relevant difference in their culpability or personal circumstances, **R v Sykes**, 2 Cr. App. R(S.) 173, C.A.; **R. v. Good- acre** [1996] 1 Cr. App. R (S.) 424 C.A*
> >
> > *Furthermore, "a failure to distinguish in favor of a defendant who has pleaded guilty will normally amount to disparity. There may equally be disparity where the difference between the sentences imposed on two defendants either exaggerates the difference in their culpability or personal circumstances, or is insufficient to mark the difference, **R. v. Tilley**, 5 Cr. App. R.(S.) 235, CA; **R. v Griffiths** [1996] 1 Cr. App. R. (S.) 444, CA.*

> *Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious.*
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> *Archbold, 2012, 5-159, pages. 608 – 609* (Emphasis added)

[20] This ground has no merit. Firstly, the parity principle in sentencing only applies when the sentences imposed on the appellant is significantly more than that imposed on a co-accused who was charged with identical offences. On the fact of this case, the co-accused who were charged and convicted on the same three counts of Robbery with Violence, wherein one count is the home invasion of Mr Stephen John Paul and infliction of personal harm to the owner of the home, is Serevi Vananalagi, not Iowane Salacakau. Both the appellant and co-accused Serevi Vananalgi were sentence to 13 years imprisonment with non-parole period of 11 years i.e., for 3 counts of Robbery with Violence and 1 count of Unlawful Use of Motor Vehicle. There is no disparity in sentence there.

[21] The appellant conveniently chose the sentence imposed on co-accused Iowane Salacakau who was charged and convicted with two counts of Robbery with Violence, not three counts like those of the appellant. The two counts for which co-accused Iowane Salacakau were convicted did not include the Count on the Robbery with Violence of the home of Mr Paul, which was treated for sentencing purposes differently by the court being a home invasion and usually attract a higher sentence. As already observed the appellant's claim of disparity of sentence has no basis when you compare it to the sentence passed on Serevi Vananalgi – it is treating like with like.

[22] It should be evident from the above assessment that the claim by the appellant that there was disparity in sentence or lack of parity in sentences in this case has no merit. This ground of appeal is dismissed.

[23] In light of the above determination of the court the leave application against sentence is partially allowed.

Qetaki, JA

[24] I have considered the judgment in draft and I agree with it and the reasoning.

ORDERS:

1. Leave to appeal against sentence is partially allowed.
2. Sentence passed in the High Court against the Appellant, is set aside.
3. The Appellant is sentenced to 12 years and 4 months imprisonment with 10 years 4 months non-parole period, effective from 9 September 2011.

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

COURT OF APPEAL
FIJI

Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:
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