

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

CRIMINAL APPEAL NO. AAU 078 OF 2019
[Suva Criminal Case No. HAC 243 of 2017]

BETWEEN : **EMOSI BALEIDROKADROKA**
Appellant

AND : **THE STATE**
Respondent

Coram : **Mataitoga, P**
Qetaki, RJA
Andrée Wiltens, JA

Counsel : **Ms. P. Mataika for the Appellant**
: **Ms. B. Kantharia for the Respondent**

Date of Hearing : **7 November 2025**

Date of Judgment : **28 November 2025**

JUDGMENT

Mataitoga, P

[1] I agree with the reasons and conclusion.

Qetaki, RJA

(A). Introduction

[2] The appellant had been indicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009 committed on 29 August 2017 at Suva in the Central Division.

- [3] On 24 May 2019 the appellant represented by counsel had pleaded guilty. He had admitted the summary of facts.
- [4] Upon being satisfied that the appellant had fully comprehended the legal effect of the plea of guilty and his plea was voluntary the trial Judge had convicted him on 7 June 2019 and sentenced him to 10 years imprisonment with a non-parole period of 8 years. After deducting the period of remand, the actual period was 9 years and 7 months with a non-parole period of 7 years and 7 months.
- [5] The trial Judge ordered that the above sentence be served consecutively to two concurrent sentence the appellant was already serving in relation to Criminal Case HAC 117 of 2018 (Aggravated Robbery) where a sentence of imprisonment of 8 years and 9 months with a non-parole period of 6 years and 9 months was imposed on 28 March 2019; and Criminal Case 115 of 2018 (Aggravated Robbery), where a period of 9 years imprisonment with 7 years non-parole period was imposed on 9 May 2019.
- [6] Being aggrieved by the decision of the High Court, the appellant filed a timely appeal against conviction and sentence. He was on 8 October 2021 refused leave to appeal conviction, but allowed leave to appeal sentence. The appellant has relinquished his appeal against conviction and is only appealing against his sentence.

(B). Ground of Appeal

- [7] The appellant's sole ground of appeal against sentence is as follows:

Ground 1- *Breach of the Totality Principle in making the current sentence consecutive to the other two sentences.*

(C). Facts

- [8] Paragraph 3 of Sentence (dated 7th June 2019) states:

“3. According to the summary of facts, which you admitted in the court, that you have committed this crime with four other accomplices. You and your accomplices had entered into the house of the complainant at about 2a.m. on the 29th of August 2017, while the complainant, his wife and his nephew were sleeping in their respective rooms. All of you were masked and armed with knives and pinch bars. You have entered into the house by removing the louvre

blade from the window. You have then entered into the room of the nephew of the complainant, who was eighteen years old at that time. You and your accomplices had threatened him with a bolt cutter. You then tied up the hands, legs and mouth of the young nephew of the complainant using neck ties. After stealing certain items from the room of the nephew of the complainant and also from the sitting room, you have entered into the bed room of the complainant and his wife. After threatening them not to shout, the hands, legs and mouth of the complainant was tied up with neck ties. The hands of the wife of the complainant was also tied in the same manner. You and your accomplices have then stolen the items as described in the information. Having stolen those items, you and your accomplices had fled the house, using the vehicle of the complainant, which is registered as FZ 079.”

(D). The Law

[9] The test for leave to appeal against sentence 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 v The State** Criminal Appeal No. AAU0015. The four factors 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.

(E). High Court Sentencing on 7 June 2019 (per R.D.R. T. Rajasinghe)

[10] The approach taken by the trial Judge in considering whether to impose a consecutive sentence with the two sentences currently being served by the appellant is well captured within paragraphs 20 to 30 of Sentence delivered on 7 June 2019.

[11] Section 22(1) of the Sentencing and Penalties Act 2009, deals with concurrent and consecutive sentences:

“Subject to subsection (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.”

[12] Every sentence imposed by a court must be served concurrent with any pending sentence of imprisonment. However, section 22(1) has allowed the court to decide otherwise. This is illustrated in the decision of the Supreme Court in **Vagewa v State** [2016] FJSC 12; CAV0016.2015 (22 April 2016) where Keith J outlined the proper construction of section 22(1), holding:

“In my opinion, the proper construction of these provisions is as follows; The default position is that any term of imprisonment passed on someone by a court has to be served concurrently with any sentence of imprisonment he is currently serving. There are two situations in which the default position must or may be disapplied. It must be disapplied in any of the five circumstances set out in section 22(2). That is the effect of the opening words of section 22(1)- “Subject to subsection (2)” and the opening words of section 22(2)- “Subsection (1) does not apply...” In addition, though, even in a case which does not come within any of the five circumstances set out in section 22(2), the default position may be disapplied. That is the effect of the words “unless otherwise directed by the Court” in section 22(1).”

[13] The applicable approach in imposing consecutive sentences was discussed by this Court in **Tuibua v State** [2008] FJCA 77; AAU0116.2007S (7 November 2008). The approach consists of the following consideration:

(i) It recognized the totality principle as a principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences.

(ii) 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.

*(iii) 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).*

(iv) When a sentence imposes a term 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 Miller (1980) 2 Cr.App R.(S.) 357 and Nollen v Police (2001) 120 A Crim.R 64.

- [14] The trial Judge observed that the totality principle in sentencing encompass two main elements, firstly, proportionality between the sentence and the offence, and secondly, the Court must not impose a “crushing” sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release: (Martino v Western Australia [2006] WASCA 78[16]).
- [15] One of the main purposes of sentencing is to protect the public from the commission of such crimes by making clear to the offenders and to other persons with similar impulses that, if you commit such a crime, you will meet with severe and appropriate punishment. If the Court applies the default position of concurrent sentence as stipulated under section 22 (1) of the Sentencing and Penalties Act 2009, the accused will only serve a period of nearly ten years for the commission of above discussed three serious violent crimes. It would undoubtedly be perceived by the public as a weak and lenient punishment for such a series of horrendous crimes committed on innocent citizens of the society.
- [16] A consecutive term of imprisonment would precisely reflect the proper proportionality between the gravity and seriousness of the offence and the sentence. The accused is 26 years old and maximum penalty for the offence of aggravated robbery is twenty years imprisonment. A consecutive sentence would not destroy any reasonable expectation of a useful life after release.
- [17] Taking into consideration the above reasons, it was ordered that the sentence is to be served consecutive to the remaining period of the current two sentences that the accused is presently serving.
- [18] Below, I have reproduced various paragraphs from the Sentence delivered by the sentencing Judge:

“4. This is a violent home invasion in the night while the occupants were sleeping and then stealing therein. The Supreme Court in **Wise v State** [2015] FJSC 7..... found that:

“It is our duty to make clear these types of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that the inhabitants can sleep safely in their beds without fear of armed and violent intruders.”

5. In view of the above observation made by the Supreme Court of Fiji in respect of violent home invasion in the night, I find this a very serious offence.

6. In view of the seriousness of this offence, it is my opinion that such offenders must be dealt with severe and harsh punishment. Therefore, the purpose of this sentence is founded on the principle of deterrence and protection of community.

.....

9. The complainant was 58 years old and his wife was 56 years old at that time. The nephew of the complainant was 18 years old. Undoubtedly, this is a horrific and horrendous experience to them. This horrific experience would definitely stay in their mind for a long period. The victim impact report explains the depth of the emotional and psychological effect caused by this dreadful crime to the complainant and his wife.

.....

.....

13. You have been adversely recorded with five previous convictions. However, three of those offences were committed after the commission of this offence. Hence, for the purpose of this sentence, you have two previous convictions. There is no evidence or information before this court to consider your general reputation in the society and also no information about any significant contribution that you have made to the community. Therefore, you are not entitled to any discount for your previous character.

14. You pleaded guilty to this matter just before the commencement of the hearing. Therefore, you are only entitled to a meagre discount for your plea of guilty.

15. Having taken into consideration the above discussed reasons, I sentence you to ten (10 years imprisonment to the Offence of Aggravated Robbery.

16. Having considered the seriousness of this crime, the purpose of this sentence and your age I find (8) years of non-parole period would serve the purpose of this sentence. Hence, you are not eligible for any parole for a period of (8) years pursuant to section 18(1) of the Sentencing and Penalties Act.

Head Sentence

17. Accordingly, Mr Emosi Baleidroka, I sentence you to a period of ten (10) years imprisonment to the Offence of Aggravated Robbery, contrary to section 311(1)(a) of the Crimes Act. Moreover, you are not entitled to any parole period for a period of eight (8) years pursuant to section 18(1) of the Sentencing and Penalties Act.

Actual Period of the Sentence

18. You have been remand in custody for this case for a period of four (4) months and twenty two (22) days before the sentence as you were not granted bail by the court. In pursuant of section 24 of the Sentencing and Penalties Act, I consider the period of five (5) months as a period of imprisonment that have already been served by you.

19. Accordingly, the actual sentencing period in nine (9) years and seven (7) months imprisonment with non-parole period of seven (7) years and seven (7) months.

Consecutive Sentences

20. You are currently serving two sentences. The first sentence is a period of eight (8) years and nine (9) months with six (6) years and nine (9) months of non-parole period, which was imposed on you on 28th of March 2019 in respect of HAC 117 of 2018. The second sentence is a period of nine (9) years imprisonment with seven (7) years non-parole period which was imposed on

the 9th of May 2019 in respect of HAC 115 of 2018. You are presently serving both of these sentences concurrently. Moreover, the above two sentences were imposed on you in relation to the offences of Aggravated Robbery.

.....
.....

22. Having taken into consideration the nature of the offences for which you are presently serving, I draw my attention to consider whether this is an appropriate sentence to be served consecutive to the above two sentences.....”

[19] The learned sentencing Judge then analysed the law applicable to the imposition of consecutive sentencing, which included the application of section 22(1) of the Sentencing and Penalties Act and its principles and guidelines related to its application/interpretation as enunciated in **Vagewa v State**, and **Tuibua v State**.

[20] On the purpose of sentencing in this case, the sentencing Judge concluded (paragraphs 29 and 30), as follows:

“29. One of the main purpose of the sentencing is to protect the public from the commissions of such crimes by making it clear to the offenders and to other persons with similar impulses, that, if you commit such a crime, you will meet with severe and appropriate punishment. If the court applies the default position of concurrent sentence as stipulated under section 22(1) of the Sentencing and Penalties Act, the accused will only serve a period of nearly ten years for the commission of above discussed three serious violent crimes. It would undoubtedly be perceived by the public as a weak and lenient punishment for such a series of horrendous crimes committed of innocent citizen of the society.

30. Therefore, a consecutive term of imprisonment would precisely reflect the proper proportionality between the gravity and seriousness of the offence and the sentence. The accused is 26 years old and maximum penalty to the offence of aggravated robbery is twenty years imprisonment. Therefore, a consecutive sentence would not destruct any reasonable expectation of a useful life after release.”

(F). Appellant's Case

[21] The appellant submits that there is a breach of the Totality Principle in sentencing in this case and there are two issues which the Full Court is to consider as raised by the single Judge. The issues are: (1) Whether it was correct to make the appellant's sentence consecutive to the two sentences he was serving at the time, and (2) The failure to fix a non-parole period for the aggregate sentence of over 18 years imprisonment. A third issue is in connection with whether the appellant should have been declared a habitual offender pursuant to section 11 of the Sentencing and Penalties Act 2009.

[22] **Consecutive or Concurrent Sentences:** The appellant submits that section 22(1) of the Sentencing and Penalties Act 2009 provides that every term of imprisonment must be served concurrently unless the term of imprisonment falls under one of the exceptions listed in subsection (2) or the court has directed otherwise. It submits that in this case, we are only concerned with the latter situation i.e. A direction by the court, as the exceptions in subsection (2) are not applicable to the appellant's case.

[23] The appellant submits that the trial Judge had considered the law and relevant principles relating to the imposition of consecutive sentences as outlined in **Vaqewa** (supra) prior to determining the factors upon which a decision to impose a consecutive sentence could be based. The following factors were relied upon in the imposition of a consecutive sentence: (a) the "amount of violence" and; "frightening circumstances" in the present case; (b) the fact that the appellant had committed three aggravated robberies in seven months;(c) the opinion that the concurrent sentence would be perceived by the public as a weak and lenient punishment, and (d) the opinion that a consecutive sentence "would not destruct any reasonable expectations of a useful life after release ".

[24] The appellant submits that the trial Judge had been mistaken, in failing to take into consideration, in determining whether to impose a consecutive sentence, the following:

*(1). The possible mitigating factors were suggested in the guideline judgment of **State v Eparama Tawake**, per Keith J including "Youth or lack of maturity which affects the offender's culpability". This was also identified in the*

guideline case *Seru v State* [2023] FJCA 67. These mitigating factors are explained in more detail in *State v Chand* [2023] FJCA 252; AAU75.2019 (29 November 2023).

(2) His age (23 to 24) at the time of commission of the offences identified by the sentencing Judge as having occurred between 29 August 2017 and 15 March 2018. He would have been classified as “young adult” under the guideline judgments. This could explain his involvement with others and not acting alone, and could also determine the appellant’s “level of inherent criminality”.

(3) A decade in prison could be considered a “weak or lenient punishment” by the Court, the public or anyone else. As Keith J observed in *Kumar v State*: “Sentences of 10 years represent long periods of incarceration by any standards.

(4) A concurrent sentence of 10 years imprisonment with a non-parole period of 8 years is sufficient to denounce the appellant’s crime and deter him from committing such offences in future – it also keeps in mind the fact that the appellant will have ample time in prison this second time around to mature and rehabilitate himself.

(5) Whilst serving his sentence in HAC 117/18 voluntarily pleaded guilty to the two other robberies in the course of one month (May- June 2019) and this shows his intention to take responsibility for his actions, the up loose ends, and move on with his life-this would also weigh in favour of a concurrent sentence as it indicates remorse and improves the prospects of effective rehabilitation.

(6) The trial Judge did not make mention of “personal circumstances” of the appellant when considering concurrent or cumulative sentence and instead focussed only on aggravating factors of the offence and the other robberies committed.

(7) The appellant’s age at the time the offences were committed, his prospects for rehabilitation, and his guilty pleas in two out of three cases were relevant considerations when determining whether or not to exercise the discretion to impose a consecutive sentence and, given that the sentencing Judge failed to

take these factors into account, it is submitted that the sentencing discretion miscarried in that respect.

[25] The appellant submits that the order for the sentence in this case to be served consecutively with the sentences in HAC 117/18 and HAC and HAC 115/18 be quashed and replaced with an order for all three sentences to be served concurrently. The question of an appropriate non-parole period for an aggregate sentence does not arise given the appellant's position above.

(G). Respondent's Case

[26] Respondent's written submissions conceded that trial Judge may be mistaken in ordering consecutive sentences not concurrent - section 22 (1) and (2) of Sentencing and Penalties Act 2009. The court could opt for part consecutive and part concurrent sentence. That appellant is a habitual offender, but there was no cross-appeal. Respondent preferred to leave matters to Full Court to make determination on 2 issues raised at the leave stage and on habitual offending. This requires consideration of previous convictions.

(H). Analysis

[27] The test and guideline for a successful sentence appeal was identified in **Kim Nam Bae**, and the appellant has an obligation to demonstrate that any of the 4 factors was breached by the sentencing Judge. The primary issue is whether the learned trial Judge erred in imposing a consecutive sentence to the two sentences the appellant was serving at the material time. Section 22(1) of the Sentencing and Penalties Act 2009, provides that every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment. Subsection (2) of section 22 sets out the exceptions, that is, the circumstances under which the imposition of concurrent sentence or sentences may not apply.

[28] The learned trial Judge relied on the Supreme Court decision in **Vaqewa v State** (supra) where Keith J outlined the proper construction of section 22 (1)- see paragraph [8] above. Keith J, held that the default position under section 22(1) may be disapplied

in two situations, firstly, under circumstances in subsection (2) of section 22, and the second is when “unless otherwise directed by the Court.”-in section 22(1).

[29] In this case, the learned sentencing Judge disappplied the default position (section 22 (1)) by directing (“*unless otherwise directed by the Court*”) and imposing the consecutive sentence , pursuant to section 22(1) , presumably based on his perception of : (a) the “amount of violence “used and “frightening circumstances” in the present case; (b) the fact that the appellant had committed three aggravated robberies within seven months;(c) the opinion that the concurrent sentence would be perceived by the public as a weak and lenient punishment, and (d) the opinion that a consecutive sentence “would not destruct any reasonable expectation of a useful life after release.”.

[30] Criticisms against the imposition of consecutive sentence on the appellant are based on lack of consideration of the appellant’s age (23/24) at the time of offending, his prospects of rehabilitation, and his guilty pleas; that it cannot be seriously be argued that a decade or more years in prison could be considered a “weak or lenient punishment” by the court, the public or anyone else.; the trial Judge did not consider the appellant’s personal circumstances but instead focussed only on aggravating factors of the offence and the other robberies committed.

[31] According to the appellant, these factors ought to have been taken into account when the trial Judge exercised his discretion to impose a cumulative and not a concurrent sentence. Indeed, the learned trial Judge may have been mistaken in imposing a consecutive sentence to the extent that the trial Judge could have exercised his discretion to impose a sentence which is partly concurrent and partly consecutive given the facts and circumstances of the case and the appellant’s personal circumstances.

[32] One must not lose sight of the Sentencing Guidelines set out in section 4 of the Sentencing and Penalties Act 2009, which in section 4(1) declares the ‘only purposes’ for which sentencing may be imposed by a court, and these are: (a) to punish offenders to an extent and in a manner which is just in all the circumstances;(b) to protect the community from offenders;(c) to deter offenders or other persons from committing offences of the same or similar nature;(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated; (e) to signify that the court

and the community denounce the commission of such offences; or (f) any combination of these purposes.

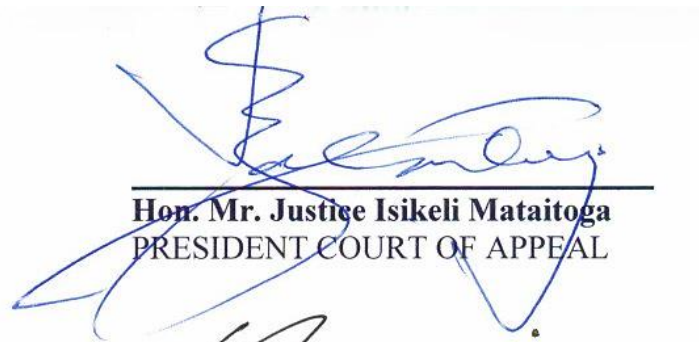
- [33] In considering the purposes for sentencing, a sentence imposed by the sentencing Judge in this case, in my view, ought to take into account all of the purposes specified in (a), (b), (c), (d) and (e) above.
- [34] Additionally, any sentence imposed in this case must aim to deter the appellant as well as offenders or other persons from committing offences of robbery with violence and related offences. The community must be protected from such offenders, and the court must signify the communities' denunciation of the commission of robbery with violence and related offences.
- [35] The sentence in this case must also promote an opportunity, environment and initiatives for the rehabilitation of the appellant and offenders who commit robbery with violence and related offences. The imposition of a concurrent sentence will not, (as observed by the sentencing judge), serve the sentencing purposes desired and appropriate given the facts and circumstances of offending by the appellant, and the prevalence of robbery with violence and related offences.
- [36] Given the foregoing, I am not persuaded that the appellant had demonstrated that the sentencing Judge had either, acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts or failed to take into account some relevant consideration.
- [37] The learned trial Judge did not fix a non-parole period of imprisonment as permitted under section 18 of the Sentencing and Penalties Act 2009. Section 19 (1) of the same Act provides that, the failure of the sentencing court to fix a non-parole period under section 18 does not invalidate the sentence but any court hearing an appeal against the sentence may impose a non-parole period in accordance with section 18. The maximum sentence for robbery with violence is 20 years imprisonment. The cumulative sentence, now upheld, takes the appellant's total sentence to around 19 years imprisonment. On that basis, I fix the non-parole period at 17 years imprisonment. The appeal has no merit and is dismissed.

Andrée Wiltens, JA

[38] I agree with the decision and have nothing to add.

Orders of the Court

1. *The Appeal against sentence is dismissed.*
2. *The sentence is affirmed with a non-parole period of 17 years imprisonment, added.*



Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT COURT OF APPEAL



Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL



Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

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