IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0004 of 2018
[On Appeal from the Court of Appeal No. AAU 129 of 2013]

BETWEEN : **NETANI DOMONIBITU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof**
Judge of the Supreme Court

Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Hon. Mr. Justice Quentin Loh
Judge of the Supreme Court

Counsel : **Ms. S. Ratu for the Petitioner**
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : **17 August, 2018**

Date of Judgment : **24 August, 2018**

JUDGMENT

Marsoof, J

[1] I have had the advantage of reading the judgment of Chandra J in draft, and I agree with his judgment and the orders proposed by him.

Chandra, J

[2] The Petitioner with four others were charged with five counts of the offences of manslaughter, aggravated robbery, act with intent to cause grievous bodily harm ad assault causing actual bodily harm contrary to sections 239, 311(a)(b), 255(a) and 275 (a) of the Crimes act 2009.

[3] The Petitioner was the fifth accused in the case and the second Appellant before the Court of Appeal.

[4] The Petitioner and other four accused entered a plea of guilty in the High Court and were convicted. The Petitioner was sentenced to ten years imprisonment and was to serve a minimum of eight years' imprisonment.

[5] The Petitioner sought leave to appeal against his sentence to the Court of Appeal and a Single Judge of the Court of Appeal refused leave.

[6] The Petitioner renewed his application for leave to appeal against sentence to the Full Court of the Court of Appeal.

[7] By judgment dated 30th November 217, the Court of Appeal dismissed the Petitioner's appeal against sentence, quashed the sentence imposed by the High Court and sentenced the Petitioner to 15 years and 4 months imprisonment and ordered that he should serve a minimum term of 13 years imprisonment.

[8] The Petitioner seeks special leave to appeal from the Supreme Court and has set out the following grounds of appeal:

1. Whether the sentence passed by the Appellate Court are so disproportionate as to leave the Petitioner with a larger sentence in comparison with the sentence passed by the trial Judge to the 2nd, 3rd and 4th accused persons and whether the sentence passed by the Appellate court breached and violated the parity principle of sentencing the co-accused and right to equality before the law?

2. Whether the phrase "any term" in section 27(1) of the corrections Act of 2006 relating to remission of sentence is applicable to a 'non-parole' imposed by a court and whether the current practice of the Commissioner of corrections regarding the calculation of remission of sentence to non-parole term in consistent or does it question its legality.

3. Whether the Appellate court erred in enhancing the sentence in the absence of the parole board and whether the sentence passed on appeal was severe in violating the totality principle.

In his petition seeking special leave to appeal he has set out the following as well:

(i) The Appellate Judge acted upon a wrong principle.
(ii) The Appellate Judges allowed extraneous or irrelevant matters to guide or affect them.
(iii) The Appellate Judges mistake a fact.
(iv) The Appellate Judges did not take account of some relevant considerations.

Summary of Facts

[9] The following summary of facts is set out in the judgment of the Court of Appeal as narrated by the learned Trial Judge in the High Court :

"[4] Jose Anselme and his wife Neila lived with their three children (Roger 16, Alex 7 and Chana 3) in Tuvu, Lautoka where they owned and operated a beche-de-mer export

enterprise. They employed Jone as a caretaker/security and Vilimaina as a housekeeper. Jone lived in the main house and Vilimaina was in a room abutting the house. There was in addition a bulk store for "Tuvu Seafood" located within the residence.

[5] Nalulu (1st accused) worked in the beche-de-mer business in the West in 2010. He is related to Waisale (2nd accused). For 2 weeks prior to 1 November 2010 they planned to burgle and steal from Tuvu Seafood by invading the Anselme residence at night. They put together a team of 5. Tokamalua (3rd accused) and Biautubu (4th accused) had agreed to join the enterprise and Waisale recruited Domonibutu (5th accused)

[6] On 1st November 2010, the Anselme family settled down for the night. Jone and Vilimaina also went to their beds. At 4.00am on 2nd November the house was invaded by the gang.

[7] Waisale and Domonibitu lived in Lami and they planned to travel to the West on 1st November 2010. They hired a taxi from Suva to take them. They told the driver that they were going to Lautoka to pick up beche-de-mer. They arrived in the taxi at 3.00a.m. at Drasa seaside where by arrangement they picked up the others in the gang. The group directed the taxi to the Anselme residence which was pointed out to them all by Nalulu (1st accused). Weapons were distributed amongst the group and these weapons included knives and iron rods. After conferring together it was decided that the assault would be twofold: an invasion of the house to get cash and valuables and an invasion of the security guard's room to get the bulk store keys. They would carry this out masked and armed with their weapons.

[8] Nalulu (1st accused) kicked open the door to Jone's room and he entered along with Waisele (2nd accused). They grabbed the keys to the store but Jone tried to resist them. He was hit on the head with an iron rod resulting in a 2cm to 3 cm wound to his forehead which was deep and needed to be sutured.

[9] At the same time as events described in paragraph 8 were taking place, Domonibitu (5th accused) kicked open the door to the residence and with 3rd accused and 4th accused he entered the hallway. Jose and Neila (Mr & Mrs Anselme)

jumped out of bed and Jone went to investigate. Roger Anselme (aged 16) met his father in the hallway and then went into the parents' bedroom where he and his mother tried to barricade the door to prevent entry.

[10] Jose (Mr Anselme) was still in the hallway and he engaged in a struggle with Domonibitu (5th accused) in the course of which Jose was stabbed "many times" in the stomach. Jose fell to the ground and when he tried to get up to call for help 3rd accused and 4th accused forcible prevented him from getting up.

[11] The gang managed to gain entry to the parents' bedroom where Roger was. They assaulted him on the face resulting in contusions and bruises. Mrs. Anselme had left to go to the neighbor to call for help. The group took Jose's mobile phone and a Brica digital camera. They also took several other smaller items being the property of Mr. & Mrs. Anselme.

[12] Vilimaina (the housekeeper) had been woken up by the melee and tried to flee the house. She was grabbed and brought back and her watch, handbag and wallet were stolen. There was $85.00 cash in the wallet.

[13] The group then unsuccessfully tried to enter the bulk store but being unable to, rushed back to the taxi and drove away.

[14] Jose (Mr Anselme) lay in the house bleeding from his stomach. He succumbed at 6.00pm on 2nd November, the cause of death being 'excessive blood loss from multiple stab wounds'.

[15] The taxi conveyed three of the group back to Lautoka and the other two back to Lami Town. The driver being suspicious of the groups' actions alerted the police. Acting on his information, all five were arrested and interviewed under caution and all five made admissions."

Jurisdiction of the Supreme Court

[10] The threshold for granting special leave to appeal to the Supreme Court is very high and the Petitioner has to reach that threshold to get leave to appeal. Section 7(2) of the Supreme Court Act 1998 states:

"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:
(a) A question of general legal importance is involved;
(b) A substantial question of principle affecting the administration of criminal justice is involved; or
(c) Substantial and grave injustice may otherwise occur."

[11] In **Aminiasi Katonivualiku** [2003] FJSC 17; CAV 0001/1999 (17 April 2003) the Supreme Court stated :

"It is plain from this provision that the Supreme Court is not a Court of criminal appeal or general review nor is there an appeal to the Court as a matter of right and, whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal ....."

The Present Petition

Ground 1

[12] The Petitioner (who was the 5th Accused) was sentenced to 10 years imprisonment and had to serve a minimum term of 8 years imprisonment while his accomplices were sentenced as follows:

1st Accused – 12 years imprisonment with a minimum term of 8 years to be served;

2nd Accused – 9 years imprisonment with a minimum term of 7 years to be served;

3rd Accused – 9 years imprisonment with a minimum term of 7 years to be served;

4th Accused – 10 years imprisonment with a minimum term of 7 years to be served.

[13] In sentencing the Petitioner and his accomplices the learned trial Judge had been consistent in sentencing all of them, the differences in their ultimate sentences were on the basis of different aggravating and mitigating factors in respect of them.

[14] The Court of Appeal when dealing with the appeal against sentence by the Petitioner, dismissed his appeal but acted in terms of section 23(3) of the Court of Appeal Act, 2009 in increasing the sentence to 15 years and 4 months with the a minimum term of 13 years to be served. At the commencement of the hearing of the appeal, the Petitioner had been informed that the Court had the power to pass any sentence warranted by law if it thought that a different sentence should have been passed and afforded him an opportunity to make submissions in that regard.

[15] The petitioner had consulted his Counsel and informed the Bench that he wished to proceed with the appeal and the parties made their submissions on that basis.

[16] The Petitioner's complaint is based on the parity principle and at first glance the sentence imposed by the Court of Appeal on him appears to be disproportionate to the sentences imposed on his accomplices, specially the sentences imposed on the second, third and fourth accused.

[17] It is to be observed that the third and fourth accused had not appealed against their sentences, the second accused had appealed against his sentence but abandoned same at the hearing before the Court of Appeal. It was only the 1st accused and the Petitioner who had proceeded with the appeal after they were informed by the Bench that the Court had the power to vary their sentences.

[18] The Court of Appeal in their judgment set out the reasons for enhancing the sentence of the Petitioner, cited the decision in **Wallace Wise v The State** CAV0004 of 2015: [2015] FJSC 7 (24 April 2015) and stated as follows:

> *"[33] In **Wise** the Supreme Court said that sentences will be enhanced where additional aggravating factors are also present and itemized the following as examples of such features. This list is obviously not exhaustive. In my view, this approach is an indication by the Supreme Court that in*

the case of an aggravated robbery with the following, similar or more serious features, the ultimate sentence could even go up to 16 years, the maximum being 20 years (vide section 311 of the crimes ct, 2009)

(i) offence committed during a home invasion.
(ii) in the middle of the night when victims might be at home asleep.
(iii) carried out with premeditation, or some planning.
(iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.
(v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.

(vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.

[39] It is well established that if the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (vide ***House v The King*** *[1936] HCA 40; (1936) 55 CLR 499) and* ***Bae.***

[40] To me, the facts and circumstances of this case would shock the conscience of any court and the law abiding and peace loving citizenry and those sentiments should be expressed by way of an appropriate sentence by this Court. In my view, the Learned Trial Judge had acted on a wrong principle and erred in law in taking the lowest ends of 10 years as the starting point for manslaughter and 09 years for aggravated robbery committed with extreme violence. In my view, he should have taken at least 12 years as the starting point for manslaughter and aggravated robbery. I would not disturb the addition of 05 years for common aggravating factors, thus arriving at an aggregate sentence of 17 years.

[41] It is also revealed that the 02nd Appellant led the group of three of the five accused, kicked the door to the deceased's residence and stabbed the deceased running towards them several times in the stomach with the kitchen knife he was armed with on the hallway causing multiple stab wounds. He also entered the bed room of Mr. and Mrs. Anselme and punched Roger Anselme on the face causing contusions and bruises. His personal involvement in this extreme violence as an additional aggravating factor had not been taken into account by the Trial Judge and on that account I would add 1½ years to the aggregate sentence making it 18½ years."

[19] The Court of Appeal, had considered that the learned trial Judge had acted on a wrong principle and erred in law in taking the lowest end of the starting point which would accord with the judgment in **Kim Nam Bae** (Supra) where it was stated that the Appellate Court can impose a different sentence if a trial judge acts upon a wrong principle.

[20] The Court of Appeal had considered the aggressive and violent manner in which the Petitioner had conducted himself in committing the crimes which resulted in him causing the death of the chief householder by stabbing him and thereafter punching the son of the deceased. The Court of Appeal was of the view that the learned High Court Judge had failed to take into account these factors as additional aggravating factors.

[21] The other matter that the Court of Appeal had considered in enhancing the sentence of the Petitioner was regarding the discount given for the guilty plea, and stated:

*"[44] In **Chand v State** Criminal Appeal No. AAU0063 of 2012: 27 May 2016 [2016] FJCA 65 the Court of Appeal said that a plea of guilt should always be taken into account when imposing the sentence and the weight to be given to a guilty plea depends on a number of factors such as:*

(i) Whether the plea of guilt is an indication of contrition independent of the fact of pleading guilty or whether the plea resulted from the recognition of the inevitable.
(ii) Whether the plea of guilt could be considered as a

factor in mitigation for saving the time and cost of the trial depending on when the plea was entered or indicated.

[45] In this case the 02nd Appellant from 2010 to 2013 (19 court days in the High court) had steadfastly maintained that he would contest the caution interviews and the case and then informed court that he would plead guilty for all counts only if the count of murder were to be brought down to that of manslaughter. I do not see any remorse in this exercise. Therefore, in my view 2½ years would be an appropriate reduction for the late guilty plea."

[22] The Petitioner had pleaded guilty only after the prosecution had amended the murder charge to one of manslaughter and on perusing the Court record that appears to have occurred on the basis of Counsel for the Petitioner bargaining for same with the prosecution. It would appear therefore that the plea of guilty was entered as stated in **Chand**, on recognizing the inevitable. This would also show that there was no remorse on the part of the Petitioner.

[23] It is in those circumstances that the Court of Appeal had given a discount of 2 ½ years only for the late guilty plea as against the 5 years discount given by the learned High Court Judge.

[24] The Petitioner has in his petition stated that the Appellate Judge acted upon a wrong principle, took into account extraneous or irrelevant considerations and not taken into account relevant considerations.

[25] The reasons given by the Court of Appeal do not in any way show that they acted in this manner that the Petitioner has alleged. Even if the principles set out in **Kim Nam Bae** regarding the interference by a superior Court in respect of a sentence are applied to the judgment of the Court of Appeal, none of the grounds set out in that case can be made out against the judgment of the Court of Appeal.

[26] The sentence imposed by the Court of Appeal reflects the complicity of the Petitioner in this commission of the crime, is within the tariff and based on sound reasoning.

[27] Considering the circumstances of the case and the manner in which the crimes had been committed I see no error in the Court of Appeal exercising its powers in terms of section 23(3) of the Court of Appeal Act and enhancing the sentence. This is also in keeping with the sentiments expressed by the Supreme Court in **Wise** to the following effect:

> *"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 its inhabitants can sleep safely in their beds without fear of armed and violent intruders."*

[28] As there is no error in the judgment of the Court of Appeal in the enhancement of the sentence of the Petitioner, this ground of appeal does not come within the threshold of Section 7(2) of the Supreme Court Act for the grant of special leave, and special leave is refused.

[29] The second ground of appeal urged by the Petitioner relates to the decision of the Commissioner of Corrections in determining the remission that is granted to a convicted prisoner after the non-parole period is served.

[30] This is a matter which has been referred to Court as a ground of appeal in recent times. The Supreme Court has clearly stated that the interpretation of the period of remission is a matter for the Commissioner of Corrections. **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016); **Bogidrau v State** [2016] FJSC 5; CAV0031.2015 (212 April 2016).

[31] Ms. Ratu, Counsel for the Petitioner requested this Court to consider giving a guideline judgment on this matter. It is one which this Court cannot go further than to express the same sentiment expressed by this Court in **Bogidrau v State** (supra) to the following effect:

> *"16. Mr. Waqainabete asked us to decide the matter for ourselves – perhaps by using the court's power under section 6 of the Sentencing and Penalties Decree to give a guideline judgment. For my part, I do not believe that to be possible. A guideline judgment is intended to give guidance to magistrates and judges when they pass sentence. The problem in this case is not how magistrates and judges fix the non-parole period. It is how the Commissioner calculates remission in such cases. In any event, if we proposed to pronounce on the legality of the Commissioner's practice, the Commissioner would have to be notified of that and given an opportunity to make submissions to the court."*

[32] Therefore this ground does not come within the threshold of section 7(2) of the Supreme Court Act and consequently special leave is refused.

[33] The third ground of appeal urged by the Petitioner is more or less the same as ground one advanced by him except that he has couched in the position of the absence of a parole board.

[34] Section 23(3) of the court of Appeal Act as stated earlier empowers the Court of Appeal to enhance a sentence imposed by the High Court where it considers it justified to do so in the proper administration of justice.

[35] As discussed above in terms of ground 1 the Court of Appeal had justified the enhancement of the sentence of the petitioner and is not erroneous. The presence or absence of a Parole Board has nothing to do with the enhancement of a sentence. This ground urged by the Petitioner is vague and uncertain and does not in any event meet the threshold required for the granting of special leave.

[36] For the reasons set out above, the application of the Petitioner seeking special leave to appeal is refused.

Loh, J

[37] I have read the judgment of Chandra J in draft. I agree with the judgment, the reasons and the proposed Order.

Order of Court

The application for special leave is refused and the appeal is dismissed.

Hon. Mr. Justice Saleem Marsoof
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice Quentin Loh
JUDGE OF THE SUPREME COURT