IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0025 of 2018
Criminal Appeal No. AAU 0068 of 2014

BETWEEN : **PENI TUILASELASE**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Mr. Justice Terence Arnold**
Judge of the Supreme Court

The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel : **Petitioner in person**
Ms. R. Uce for the Respondent

Date of Hearing : **08 August 2023**
Date of Judgment : **30 August 2023**

JUDGMENT

Arnold, J

[1] I take a different view from His Lordship Justice Mataitoga J on the appropriate outcome in this case, and so write separately.

[2] I gratefully adopt the statement of facts set out by Justice Mataitoga in his judgment, and his identification of the relevant legal principles. I also agree that there has been a significant delay in this case, that the courts need to be vigilant to ensure that time limits are complied with and that extensions of time are not granted readily.

[3] However, two factors persuade me that an extension of time should be granted and that that leave to appeal to this Court should be given. The first reason is that the Petitioner, Mr Tuilaselase, is a serving prisoner who is acting for himself. In those circumstances, some delay seems inevitable, and courts should take care to ensure that refusing to extend time does not cause an unrepresented and incarcerated petitioner injustice.

[4] The second reason is that I consider Mr Tuilaselase has raised a significant point in relation to his sentence, a point which means that he may suffer an injustice if it is not considered and, if accepted, rectified. In this connection I note that the Supreme Court in **Kumar & Sinu v State** held that two of the matters to be considered on applications to enlarge time are whether there is a ground of appeal meriting consideration by the appellate court and whether there is a ground of appeal that will probably succeed.[1] In my view, these considerations apply in the present case.

[5] The point that concerns me is the way Mr Tuilaselase's period of pre-trial detention was dealt with by the sentencing Judge. The period of pre-trial detention was one year and 9 months, although like the sentencing Judge, I will treat it as two years for ease of calculation. As Justice Mataitoga notes, the sentencing Judge treated time served as a mitigating factor and deducted 2 years from the head sentence of 16 years, which gave a head sentence of 14 years. The Judge then fixed the non-parole period at 12 years.

[6] It is this approach to time served that Mr Tuilaselase challenges. He argues that it is inconsistent with the approach adopted by the Court of Appeal in earlier decisions. He referred to two in particular, **Mataunitoga v State**[2] and **Lata v State**.[3]

[7] In **Mataunitoga v State** the Court of Appeal said:[4]

> In the present case, the learned High Court did consider the appellant's remand period as part of the mitigating factors identified at para 9 of the sentencing remarks. A total reduction of 3 years was made for the appellant's previous good character and remand period. However, the error is not in the head sentence but in the non-parole period of 15 years that the learned judge fixed for the appellant. When the appellant's pre-trial detention is added to his non-parole period, his total incarceration exceeds his head sentence of 16 years. Any

[1] *Kumar & Sinu v State* [2012]. FJSC 17 at para [4](iii) and (iv).
[2] *Mataunitoga v State* [2015] FJCA 70; AAU125.2013 (28 May 2015).
[3] *Lata v State* [2017] FJCA 56; AAU0037.2013 (26 May 2017).
[4] At paragraph [22].

> deduction for remand period should be reflected in the head sentence and the non-parole period (***R v Newman & Simpson*** [2004] NSWCCA 102; (2004) 145 A Crim R 361 at [25] and ***R v Youkhana*** [2005] NSWCCA 231 at [10]). The learned judge failed to make adequate reduction in the appellant's non-parole period to reflect his remand period. There is an error in the sentencing discretion in that regard.

The Court of Appeal subsequently applied this approach in **Lata v State**.[5]

[8] As will be apparent from the extract just quoted, the sentencing Judge in **Mataunitoga** adopted the same approach as the sentencing Judge in the present case – treating time served as a mitigating factor and, in combination with other mitigating factors, deducting it from the head sentence before fixing the non-parole period. The Court noted the dangers involved in this approach.

[9] Mr Tuilaselase argued that the sentencing Judge's approach to taking time served into account, when combined with the approach taken to the calculation of remission, would mean that the earliest date on which he could be released would be after he had served a little over 15 years in prison, comprising his period of pre-trial detention, the minimum non-parole period and the period of imprisonment before he qualified for remission. He argued that this was manifestly unjust.

[10] This Court has already indicated that it is concerned about the method adopted by the Commissioner of Corrections in calculating remission: see **Timo v State**.[6] But that is another issue. For present purposes, the issue concerns how time on remand should be factored into the sentencing process. The Court of Appeal has said that the correct approach is that the head sentence should be fixed (taking account of aggravating and mitigating factors), then the non-parole period should be set and after that time served should be deducted from both the head sentence and the non-parole period. That approach has some attraction, but in any event, this is an issue which the Supreme Court should consider and determine.

[11] The result is that if Mr Tuilaselase's application to enlarge time is refused, and he is denied leave to appeal, he will be required to serve a sentence that has, according to the Court of Appeal authorities, been wrongly calculated, to his detriment. I regard this as

[5] At para [53].
[6] *Timo v State* [2019] FJSC 1; CAV0022.2018 (25 April 2019).

an injustice. For myself, I would grant Mr Tuilaselase's application to enlarge time and would grant him leave to appeal, but on this point only.

Jitoko, J

[12] I concur with the judgment of Mataitoga J.

Mataitoga, J

[13] The Petitioner (Peniasi Tuilaselase) together with 3 others were indicted in the High Court at Suva, before a judge and assessors on the following counts:

(a) Aggravated Robbery: Contrary to Section 311 (1) of the Crimes Act 2009; and

(b) Theft of a Motor Vehicle: Contrary to Section 291 (1) of the Crimes Act 2009.

[14] Following the trial in the High Court, and upon a unanimous decision by the three assessors, with which the Judge agreed, all four accused persons were convicted on both counts in the indictment. All the accused were sentenced to 14 years imprisonment with a non-parole period of 12 years. Their appeals against both conviction and sentence were dismissed by the Court of Appeal on 14 June 2015.

[15] The petitioner's three co-accused then petitioned this Court for leave to appeal against that dismissal. All three applications for leave to appeal were however refused for lack of merit on 1 November 2018 by Justices Chandra, Keith and Chitrasiri in a judgment under the name **Alipate Lesi, Samuela Beeby, Sitiveni Tuisamoa v The State** CAV 0016 of 2018, CAV 18 of 2018 and CAV 20 of 2018 ('the Lesi case').

[16] In the meantime, the petitioner brought his own separate application for special leave to appeal against conviction only, in the Supreme Court: **Tuilaselase v State** [2019] FJSC 2; (CAV 0025/2018). The full court dismissed the appeal against conviction and sentence and affirmed the orders against him in the High Court.

Background facts

[17] On 25 July 2012, at about 3.00 am the victim of these crimes, Mr. Ram, saw 5 to 6 people in his compound. He shouted; "thieves! thieves!" and opened his front door in the hope that some of his neighbours would come to his assistance. But as he opened

the door, the intruders who were all wearing masks and who were armed with knives and bolt cutters, rushed into his house. They demanded money, jewellery and other items of value. They assaulted Mr. Ram and his son.

[18] In order to avoid a continuation of these assaults, Mrs. Ram gave the assailants what they wanted. In the event, the robbers got away with cash and valuables to the tune of between $20,000 and $25,000.00. Added to this, they left in Mr. Ram's car. Neither Mr. Ram nor his family members who testified at the trial were able to identify any of the intruders because they were all wearing masks.

[19] The four accused persons were later arrested and when interviewed by the police, they allegedly confessed to these crimes. All four of them denied however that these confessions were voluntarily made in that the police forced these alleged confessions out of them. The police on the other hand maintained that the caution interview statements were given voluntarily by all the accused persons, including the petitioner. In consequence a trial within a trial ensued during which the police officers involved as well as the accused persons gave evidence.

[20] At the end of these proceeding, the learned Judge gave his Ruling, admitting the caution interview statement of the petitioner (Peniasi Tuilaselase) and 2 of the co-accused (Sitiveni Tuisamoa and Alipate Lesi). These statements may be used in the trial proper and its acceptance or otherwise will be a matter for the assessors.

[21] In passing sentence on 16 May 2014, against the Petitioner and other co-accused, the trial judge relied on tariff adopted in **State v Manoa** HC Case No: 108/2009, wherein the trial judge set the sentence tariff between 8 to 14 years for aggravated robbery cases. The maximum sentence is 20 years imprisonment.

[22] The trial judge's computation of the final sentence was arrived at as follows:

> *"6. The mitigating factors is as follows:*
>
> *(i) The accused have been remanded in custody for approximately 1 year 9 months, since 14 August 2012.*
>
> *7. On count 1[Aggravated Robbery], on each accused, I start with a sentence of 11 years. I add 5 years for the aggravating factors,*

making the total of 16 years. For the mitigating factors. I deduct 2, leaving a balance of 14 years imprisonment.

8. *On count 2[Theft of Motor Vehicle] start with 1 year imprisonment add 2 years for aggravating factors, making a total on 3 years. I deduct 1 year for mitigating factor, leaving a balance of 2 years imprisonment.'*

10. *Because of totality principle of sentencing, the above sentences are concurrent to each other, so that, the final total sentence for each accused is 14 years.'*

In the Court of Appeal

[23] The petitioner together with the 3 co-accused appealed against convictions and sentence in the Court of Appeal. The single judge granted leave to all four accused, which include the petitioner] to appeal against both conviction and sentence.

[24] The full court heard the appeal of the 4 accused persons, including the petitioner on 16 May 2018 and in a judgment dated 14 June 2018, dismissed appeals against convictions and sentences.

[25] It is important to note that the petitioner submitted two grounds of appeal against sentence before the full court of appeal and that was:

(i) *"The learned trial judge took into account extraneous matters when he considered matters already present in the particulars of the offence as aggravating features of the offending;*

(ii) *The learned trial judge erred in law and in principle by imposing the sentence on the petitioner whereby the head sentence being too close to the non-parole period."*

[26] The sentence appeal was dismissed by the Court which observed that *"the sentence is legitimate and I see no reason to interfere with the learned High Court Judge's finding on quantum of sentence." [Para 32 of Beeby & Ors v State [2018] FJCA 95(CAV 0016/2018)*

In the Supreme Court

[27] On 30 July 2019 the petitioner filed an application for Enlargement of Time for Leave to file Petition for Special Leave to Appeal Against Sentence. The petitioner's

application was heard by the Chief Justice Kumar [sitting alone] on 1 December 2021. After a careful review of the submissions of the petitioner and the relevant authorities, Justice Kumar dismissed the application for enlargement of time in a ruling dated 13 January 2022.

[28] On 20 October 2022, 13 months after the ruling of the single judge, the petitioner filed a notice of motion with his supporting affidavit seeking that his application for enlargement of time, be determined by the Supreme Court constituted by 3 judges: Section 11(a) Supreme Court Act Cap 13A. It came before the Supreme Court constituted by 3 judges on 8 August for hearing on consideration of the application for enlargement of time to appeal.

[29] In his submission for enlargement of time the petitioner admits that his application is 13 months out of time. This is a very significant delay and usually a delay of up to one month may be granted with good reasons.

[30] In this application for Enlargement of Time to file a petition for Special Leave against sentence, the grounds submitted have increased to four. These are:

(i) The trial judge erred in law and in principle by imposing the sentence on the petitioner whereby the head sentence being too close to the non-parole period;
(ii) That the learned trial judge took into account extraneous matters already present in the particulars of the offence as aggravating features of the offending;
(iii) That the learned trial judge erred in fact and law when he failed to take into consideration any mitigating factors submitted when determining the sentence in this matter and thus contravened section 4(2)(j) of the Sentencing & Penalties Act 2009
(iv) That the learned trial judge erred in law when he failed to deduct the petitioners time in custody from non-parole period imposed.

[31] In terms of the grounds before the Court of Appeal for **final judgement**, only grounds (i) and (iii) above was submitted. The other two ground are new and this is the first time it is being advanced in court.

Powers of the Court

[32] Section 98 (3) of the Fiji Constitution states:

> *"(3)(b) the Supreme Court has exclusive jurisdiction subject to such requirements as prescribed by written law to hear and determine appeals from all* ***final judgements*** *of the Court of Appeal."*

[33] Rule 17 (4) of the Supreme Court Rules Cap 17A, refers to the grant of an extension of time "for good and sufficient cause shown". This indulgence appears to be confined however to non-compliance with conditions of appeal or petition post lodging, and not to enlargement of time applications. Rule 46 [now Rule 31] has been thought to provide the necessary jurisdiction for the Supreme Court to permit enlargement of time: **Josua Raitamata v. The State** [2008] FJSC 32; CAV0002.07 25th February 2008 at para. 7.

[34] Section 31 Supreme Court Act Cap 13A provides that the High Court Rules and Court of Appeal Rules and forms prescribed apply with necessary modifications to the practice and procedure of the Supreme Court. Section 26 of the Court of Appeal Act grants the statutory power for that court to enlarge time.

[35] The Supreme Court is the final court of appeal, and the procedure, save where leave has been granted beforehand by the Court of Appeal, is by way of special leave to be sought upon petition. The decision to grant special leave to hear an appeal, whether timely or not, lies with the court. At this final level special leave could allow a late appeal in cases meeting the leave criteria of section 7(2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court: see **The State v Eliki Mototabua** [2012] FJSC (CAV0005.09 9th May 2012).

[36] The Supreme Court in **Kumar & Sinu v State** [2012] FJSC 7, held that in dealing with application for enlargement of time to appeal, the appellate courts examine five factors by way of a principled approach to such applications. Those factors are:

(i) The reason for the failure to file within time.
(ii) The length of the delay.
(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced

[37] In **Rasaku v State** [2013] FJSC 4 (CAV 009/2013) confirmed the above principles and further stated at paragraph 12:

> *"These factors may not be necessarily exhaustive but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the courts to uphold its own rule, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of the court."*

[38] In the case **Queen v Brown** (1963) SASR 190, at 191, the Court says:

> *"The practice is that, if any reasonable explanations is forthcoming, and if the delay is relatively, slight, say a few days or even a week or two, the court will readily extend the time, provided that these is a question which justifies serious consideration.*

Assessing the Grounds for the Delay

[39] The grant of extension of time for a belated application for special leave to appeal is a matter for the discretion of Court. In exercising this discretion, the Court would look at the totality of the circumstances that led to the delay, the length of the delay, whether the grant of time would be futile due to the unmeritorious nature of the grounds of appeal advanced by the applicants and the possible prejudice to the Respondent, and balance these factors against the need to preserve the sanctity of the rules and the need to have finality in litigation.

[40] In this case the delay is 13 months, this is a significant delay. It would normally be rejected unless there are very good reasons in support, of the application to allow enlargement of time. In **Viliame Cavubati v State** [2003] FJCA 59; AAU 0022/2003 the court of appeal said the following:

> *"It is fundamental that a right of appeal is a creature of statute and that that right only exists to the extent created by statute. See **Police v. S.** [1977] 1 NZLR 1 (CA) **Nuplex Industries Ltd v. Auckland Regional Council** [1999] 1 NZLR 181,185. It is not a mere matter of practice or procedure, and neither a superior nor an inferior court, nor both combined **can create or take away such a right**.*

*See **37 Halsbury Laws of England** (4th ed) para 677. The requirements of the Criminal Procedure Code creating the right of appeal must be strictly complied with. See **R v. Suggett** 81 Cr. App. R.243 **Archbold Criminal Pleadings and Practice** 1995 volume 1 para. 7-166."*

[41] It is also relevant in this context to consider what Justice Byrne said in **Julian Miller v State** Crim App No: AAU 0076/2007 in regard to the importance of the compliance with statutory requirements when filing appeals in the appellate court which is quoted as:

> *"The courts have said time and again that the rules and time limits must be obeyed, otherwise the list of the courts would be in a state of chaos. The law expects litigants and would be petitioners to exercise their rights promptly and certainly, as far as notices of appeal are concerned, within the time prescribed by the relevant legislation."*

[42] In reviewing the submission urged by the petitioner in support of his application for enlargement of time to file Special leave to appeal, I conclude as follows:

(i) *The delay in this case is significant. There were no valid reasons advanced for the delay, in the submissions made by the petitioner for the filing of this application for enlarging time to appeal. When one considers the fact the Court of Appeal have considered his special leave application to appeal against both conviction and sentence and have rejected them. There is no merit in his submissions. The petitioner had an opportunity to get his sentence reviewed by the court of appeal in the case he brought himself and he specifically limited it to appeal against conviction only. He must accept the consequences of his own decision.*

(ii) *Two of the four grounds submitted in this application were not submitted before the Court of Appeal for determination, when sentence appeal was considered. I have referenced this in paragraphs 20 and 21 above. This means that it has not been part of a final determination in the Court of Appeal and the Supreme Court under the terms of section 98(3)(b) of the Fiji Constitution cannot consider them.*

(iii) *The issue raised in ground 3 of the petitioner regarding the non-parole period set by the trial judge permitted by law. The fact that **it may impact** the remission period that is normally granted by the Commissioner of Prisons, was not in evidence in the court proceeding. This claim is based solely on an assertion by the petitioner.*

(iv) *There are no grounds in the submissions made by the petitioner, that raise an issue that may satisfy anyone of the three limbs of section 7(2) of the Supreme Court Act: **Dewan Chand v State** [2023] FJSC, CAV 006 of 2021.*

[43] The one issue that I observed and that was the remand period of 21 months was taken off the head sentence as mitigating factor, rather than then as a separate standalone factor as required by Section 4(2) (j) Sentencing & Penalties Act 2009. On the facts here, it did not matter because there was no other mitigating factor, the remand period was counted as mitigating, so that the final computed sentence would be the same. There were no injustice resulting therefrom in the given facts of this case.

[44] On the submission that there is an error of law with regard to the how the non-parole period was applied by the trial judge. I find there was no error of law by the trial judge in fixing the non-parole period of the sentence in this case.

[45] In essence what the petitioner is complaining about is the effect of the non-parole period imposed as part of the sentence and its impact on the remission of the portion of sentence that the Commissioner of Prison's may grand for good behaviour. The Supreme Court had addressed this issue in some detail in **Timo v State** [2019] FJSC 22 and acknowledged that there is a problem in how the remission of sentences is administered, which need to be addressed in a proper manner respecting the rights of prisoners to get a fair overall sentence. This issue concerns the discretionary powers of the Commissioner of Prisons to grant remission or not, under a separate statute. The court should not interfere under the pretext of reviewing the sentence of the petitioner. It is properly a matter for judicial review for a separate application.

[46] There is another reason and that is section 18 of the Sentencing & Penalties Act 2009 was enacted to deal with and Supreme Court stated in **Tora v State [2015]** FJSC 23

> *"[13] It is of course relevant to note that the concept of "minimum term" has now been subsumed in the concept of a "non-parole period" under the Sentencing and Penalties Decree, 2009, but the principles discussed above remain the same and are useful in deciding this case. I can do no better than repeat what was said by this Court in paragraph [30] of its judgment in **Raogo v State** (CAV 003/2010) case,*
>
> ……
>
> *[30] 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."* (Emphasis added)

[47] In light of the above assessment and the case law relied upon, I find that there is no injustice that would compel the court to grant special leave for enlargement of time. I conclude that this application for Special Leave for Enlargement of Time to file a Petition for Special Leave Against Sentence has no merit and is dismissed.

[48] The Court Order in consequence of the above determination are set out below.

ORDERS:

1. *Application for Leave to File Petition for Enlargement of Time to appeal is dismissed*
2. *Orders made by the High Court and affirmed by the Court of Appeal affirmed.*

The Hon. Mr. Justice Terence Arnold
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Mr. Justice Filimone Jitoko
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT

SOLICITORS:
Petitioner in person
Office of the Director of Public Prosecutions, Suva, for the Respondent