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

CRIMINAL APPEAL NO.AAU 153 of 2017
[Magistrates Court of Nadi Case No. 129 of 2015]

BETWEEN	:	**PETER MENEAR GABRIEL RAKANACE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**13 October 2020**
Date of Ruling	:	**14 October 2020**

RULING

[1] The appellant and 05 others had been arraigned to be tried in the Magistrates' court in Nadi under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 and another count of theft of a motor car contrary to section 291(1) (a) of the Crimes Act, 2009 committed on 04 February 2015 at Naboutini, Sabeto in the Western Division.

[2] The appellant had pleaded voluntarily to the charge and admitted the summary of facts. The learned Magistrate had convicted him accordingly and sentenced him on 25 November 2016 to an imprisonment of 08 years with a non-parole period of 06 years and 13 months of imprisonment on the charge of theft; both sentences to run concurrently.

[3] The appellant in person had signed an untimely notice of appeal against sentence on 02 April 2017. The delay is about 03 months and one week. The Legal Aid Commission had filed an application for enlargement of time containing amended grounds of appeal, an affidavit of the appellant and written submissions against sentence on 17 July 2020. The State had tendered its written submissions on 13 August 2020.

[4] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[5] In ***Kumar*** the Supreme Court held

> *[4] 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?*

[6] ***Rasaku*** the Supreme Court further held

> *'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 court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[7] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a **'real***

prospect of success' *(see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal… …'*

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **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). 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 untimely preferred against sentence to be considered arguable there must be a real prospect of its success in appeal.** The aforesaid 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.

Grounds of appeal

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

Ground 1 – The Learned Sentencing Magistrate erred in law by ordering Correction Authorities to deduct the remand period from the sentence of 08 years imprisonment imposed.

Ground 2 – The Learned Sentencing Magistrate erred in principle by considering aggravating factors that formed part of the starting point and element of the offence.

[10] The summary of evidence as narrated in the Magistrate in the sentencing order is as follows.

[3] Summary of facts noted that on the 4th day of February, 2015 at about 2.35am at Naboutini, Sabeto, Mikaele Madigibuli [Accused 1], 23 years, Ian Robert Kalou [Accused 2], 21 years, Vilikesa Waqaseru Kalou [Accused 3], 24 years, Peter Menear Gabriel Rakanace aged 20 years of Fantasy Island, Nadi and Vilikesa Yacarogovinaka Kalou, 20 years of Navakai, Nadi broke into the house of Aktar Ali threatened, assaulted and stole $3,000.00 cash, assorted clothing valued at $1,000.00 and mobile phone valued at $3,600.00, toolbox containing tools valued at $1,000.00, spanner valued at $6.00, 1 white rope valued at $180.00, drawer valued at $10.00, shoes and boots valued at

$800.00 and after robbing the complainant, drove away in a vehicle registration number DA303 valued at $30,000.00 the property of the complainant. The vehicle later tumbled about 4km from PW1's house.

On the above date and time [complainant] was sleeping when the accused persons broke into the house from the back door. The accused persons then went into Khairun Nisha [PW2] 80 years, Domestic Duties of Naboutini and woke her up. Threatened her and demanded for money and told her not to yell. The accused persons then asked the complainant and PW2 showed them his room. The Accused persons then entered the complainant's room and started punching him whilst lying on the bed. The complainant retaliated however one of the accused punched his head and he fell on the floor. The Accused persons kept on punching [complainant] and demanded money from him. The complainant then told the Accused persons that the money is in the wooden drawer. The complainant then called his son Abdul Mujid Ali [PW3] 34 years, Businessman of Naboutini who came to his assistance and was also assaulted by the Accused persons. Accused ran away taking the wooden drawer with the above items and also the vehicle key. The Accused 2 then drove away with the complainant's vehicle. The complainant then rang his brother Liakat Ali [PW4] then came with his vehicle and saw Accused 2 driving his brother's vehicle. He gave chase and the vehicle tumbled and all Accused fled the scene. Sabeto Police Station was notified and four accused persons were arrested on the same day. The other accused were later arrested and brought to Sabeto Police Station. All accused persons were charged. There were also recoveries of items from the accused persons.

01st ground of Appeal

[11] The basis of the first ground of appeal is found in paragraph 32 of the Sentencing order where the Magistrate had stated *'I order Correction authorities to deduct respective period in remand from the sentence of 08 years and that will become your final term of imprisonment.'*

[12] The appellant argues that the impugned part of the sentencing order is obnoxious to section 24 of the Sentencing and Penalties Act and the Magistrate had not specified the length of the remand period either.

[13] There is nothing to indicate that the Magistrate had been made aware of the period of remand relating to the appellant at the time the sentence was meted out. Even in his affidavit filed in this court or his written submissions, not a word had been uttered by the appellant in that regard. Thus, it is clear that at no stage had the alleged period of remand been made known to the Magistrate. Therefore, the Magistrate cannot be criticised for not specifying the so-called period of remand or to deduct such period of

remand from the head sentence regarding that as a period of imprisonment, for he could not have acted on surmise or a hypothetical figure.

[14] In is in that context that the Magistrate had directed the correction authorities to deduct the period of remand to decide the appellant's sentence. This, direction in my view is clearly wrong.

[15] Sentencing an accused is an exclusive function of a judicial officer and cannot be delegated to any other state or government agency. Fiji Corrections Service is a disciplined force and part of the state services as defined in section 130 of the Constitution of the Republic of Fiji. It is not vested with the power to perform any judicial functions such as deciding a sentence. Thus, the Magistrate should not have abdicated his judicial function of deciding the final sentence and sought to transfer it to the Fiji Corrections Service. Fiji Corrections Service too should not embark on any exercise of disturbing the sentence imposed on the appellant by the Magistrate based on the so-called period of remand.

[16] However, given the fact that no deduction for any period of remand had been made by the Magistrate due to lack of any material before him, the real question is whether the current sentence of 08 years should be interfered with by this court on that basis.

[17] Given the generosity of the sentence, there is certainly no real prospect of success of the appellant achieving that under this ground of appeal.

02nd ground of appeal

[18] The appellant argues that the Magistrate had taken into account some factors which were part or elements of the offence of aggravated burglary.

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

[20] The Magistrate had correctly taken the tariff for aggravated robbery based on ***Wise*** and picked the starting point at 08 years being the lower end of the range. In referring to aggravating factors for which he had added 04 years to the sentence the Magistrate had stated as follows.

> '17. *The aggravating factors are attack on multiple victims and one victim an elderly lady aged 80 year, and serious injuries sustained from continuous assault demanding for money, home invasion at night, victims were asleep, privacy compromised, group offending and armed with weapons and prior planning as per caution interview and value of loss sustained by complainant about $3,000, I add 4 years and interim sentence is 12 years imprisonment.'*

[21] The appellant objects to '*group offending and armed with weapons and prior planning*' being considered as aggravating factors, for according to him they were part or elements of the offence of aggravated robbery.

[22] There appears to be some merits in the appellant's argument that being in a group is part of section 311(1)(a) of the Crimes Act, 2009. However, having an offensive weapon is not part of section 311(1)(a) with which the appellant had been charged. Prior planning may not be necessarily the same as committing a robbery in company with one or more persons in every case. It depends on all the circumstances of the case.

[23] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[24] The Supreme Court in ***Kumar*** also stated that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. That would be another example of 'double-counting', which must be avoided.

[25] Therefore, the Magistrate may have erred in taking into account *'home invasion at night'* as an aggravating factor in paragraph 17 of the sentencing order as the range of tariff between 08-16 years was set in ***Wise*** for aggravated robberies involving home invasions.

[26] However, barring those technicalities, I am convinced that the objective seriousness of the offending (not the offender) in this case definitely warranted a higher starting point in the range of 08-16 years (to be increased for aggravating features of the offender, if any) and since the starting point had been taken at the lower end of 08 years then a substantial increase in the sentence for all aggravating features (offending and offender) was warranted. In either of the above scenarios, the appellants would have the benefit of mitigating factors, if any [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[27] It has to be presumed that because the Magistrate had picked the starting point at the lower point of the tariff he had not taken into account any aggravating factors at the initial stage (despite paragraph 16 of the sentencing order) and therefore addition of 04 years to the sentence on account of such factors later is justified.

[28] On the other hand, the Magistrate had discounted 02 years for the 'early guilty plea' when the plea had taken place after the case had been called 29 times since 08 April 2015. There is nothing to indicate that the appellant had tendered his plea earlier than that. Therefore, his guilty plea could not have been regarded as an early guilty plea and he had received an undue discount which he had not deserved.

[29] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[30] Thus, there are no merits or real prospect of success in the appellant's complaint. In any event, the full court has the power to revisit the sentence including its adequacy under section 23(3) of the Court of Appeal Act if it comes up before it for determination of the appeal in due course as the sentence of 08 years is a below par sentence considering the sentences being imposed by trial judges in similar cases. The appellant seems to have been lucky to have received the sentence of 08 years of imprisonment.

[31] In that context given the facts and gravity of the case, I find it difficult to fathom why the High Court in the first place transferred this case to the Magistrates court to try the appellant and others under extended jurisdiction and I also cannot understand why the Magistrate did not send the case to the High Court for sentencing the accused when the seriousness of it became obvious.

[32] I may also highlight a few other aspects of sentencing for guidance of the trial judges and Magistrates in the light of concerns expressed by the Supreme Court in the recent part. Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[33] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[34] I have already quoted the observations of the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018). This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[35] The methodology commonly followed by judges in Fiji is the two-tiered process expressed in the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). It operates as follows.

(i) The sentencing judge first articulates a starting point based on guideline appellate judgments, the aggravating features and seriousness of the offence *i.e.* objective circumstances and factors going to the gravity of the offence itself [not the offender]; the seriousness of the penalty as set out in the relevant statute and relevant community considerations (tier one). Thus, in determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or after the guilty plea was entered. In doing this the court is taking cognizance of the aggravating features of the offence.

(ii) Then the judge applies the aggravating features of the offender *i.e.* all the subjective circumstances of the offender which will increase the starting

point, then balancing the mitigating factors which will decrease the sentence, (*i.e.* a bundle of aggravating and mitigating factors relating to the offender) leading to a sentence end point (<u>tier two</u>).

[36] However, in applying the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way obviously to do that is to follow the two-tiered approach diligently as stated above. In this regard, it is always helpful for the sentencing judges to indicate what aggravating factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[37] The observations of the Supreme Court in **<u>Qurai v State</u> [2015]** FJSC 15; CAV24.2014 (20 August 2015) is very instructive in this regard.

> *'[48] The Sentencing and Penalties Decree does not provide any specific guideline as to what methodology should be adopted by the sentencing court in computing the sentence, and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case.*
>
> *[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.*
>
> *[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.*

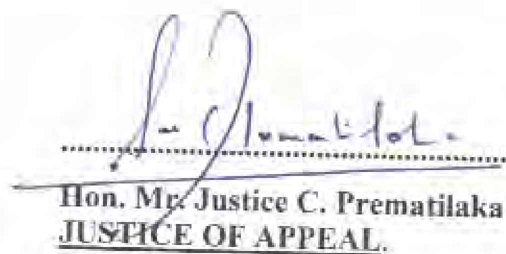
[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.

Other considerations

[38] The delay is not substantial and could be excused as initially the appellant had acted in person. The reason for the delay is not acceptable but the enlargement of time would not prejudice the respondent. Nevertheless, as pointed out above the important factor of 'merits' is overwhelmingly against the appellant.

<u>Order</u>

1. Enlargement of time to appeal against sentence is refused.



Hon. Mr. Justice C. Prematilaka
<u>JUSTICE OF APPEAL</u>