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

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

BETWEEN

: **ROPATE NAISUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

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

Date of Hearing : **31 March 2020**

Date of Ruling : **20 April 2020**

RULING

[1] The appellant with 03 others had been charged in the High Court of Suva on three counts of robbery and one count of unlawful use of motor vehicle contrary to section 293(1) of the Penal Code and section 292 of the Penal Code. The charges against the appellant were as follows.

"***First Count***

Statement of Offence

Robbery with Violence: contrary to section 293(1) (b) of the Penal Code Act 17

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA and IOWANE SALACAKUA on the 6th day of January 2010 at Waimanu Road, Samabula in the Central Division robbed one STEPHEN JOHN PAUL of a Toshiba laptop valued at $600.00, Seiko wrist watch valued at $800.00, 2 x Men's watches valued at $ 160.00, gold chain valued at $ 1000.00, all to the total value of $ 5960.00 and immediately before and after such robbery did use personal violence on the said STEPHEN JOHN PAUL.

SECOND COUNT

Statement of Offence

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to section 292 of the Penal Code Act 17.

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA and IOWANE SALACAKUA on the 6th day of January 2010 at Waimanu Road, Samabula in the Central Division unlawfully and without colour of right but not so as to be guilty of stealing, took to their own use, motor vehicle registration number DP 748, the property of STEPHEN JOHN PAUL.

THIRD COUNT

Statement of Offence

Robbery with Violence: contrary to section 293(1) (b) of the Penal Code Act 17

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA, IOWANE SALACAKUA and SAMUELA RAKOPETA on the 7th day of January 2010 at Niranjans Service Station, Walu Bay in the Central Division, robbed one AMIT PRASAD of cash $ 146.20, 7 x lighters valued at $ 50.00, assorted recharge cards valued at $ 160.00 and a cash till valued at $ 65.00 all to the total value of $ 634.40 and immediately before and after such robbery did use personal violence on the said AMIT PRASAD.

FOURTH COUNT

Statement of Offence

Robbery with Violence: contrary to section 293(1) (b) of the Penal Code Act 17.

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA, IOWANE SALACAKUA and SAMUELA RAKOPETA on the 7th day of January 2010 at the Total Service Station, Vivrass Plaza in the Central Division, robbed one SANJIWAN SAMI of cash $ 399.00 and immediately before and after such robbery did use personal violence on the said AMIT PRASAD.

[2] After full trial, the assessors had expressed an opinion of not guilty on 17 August 2011 against all accused including the appellant. However, the Learned High Court Judge in the judgment dated 19 August 2011 had disagreed with the assessors and convicted the appellant and the others of all counts. The appellant was sentenced on 09 September April 2011 to imprisonments of 13 years on the first count, 04 months on the second count, 10 years on the third count and 10 years on the fourth count with a non-parole period of 11 years and directed the sentences to run concurrently.

[3] The appellant had filed two separate timely notices of appeal against conviction (07 September 2011) and sentence (16 September 2009). Later, Legal Aid Commission appearing for three accused including the appellant had filed two amended grounds of appeal against conviction on their behalf and appeared for all three appellants at the leave to appeal hearing.

[4] Ruling on leave to appeal under AAU 0088/and 0096/2011 filed on behalf of three accused including the appellant against conviction had been delivered by a single judge on 12 July 2013 and leave against conviction had been granted on one ground of appeal. The Full Court judgment in appeal had been pronounced on 26 February 2016 under AAU 0088, 0096 and 0057 of 2011 and the appeal of the appellant and the other two accused had been dismissed and the application for enlargement of time of the 04th accused had been refused. All four accused including the appellant had sought special leave against the judgment of the Court of Appeal from the Supreme Court under CAV 0009, 0016, 0018 and 0019 of 2016 where the Supreme Court had delivered the judgment on 26 August 2016 dismissing the petitions for special leave to appeal.

[5] The appellant claims to have written a letter to the Hon. Chief Justice on 07 February 2019 inquiring about his appeal against sentence. According to him he had followed it up with another letter to the Court of Appeal registry 'recently'. Thereafter, the appellant had tendered an affidavit undated and not signed by a commissioner for oath and the CA registry had received it on 11 Oct 2019 seeking leave to appeal against sentence along with an application to appeal against sentence. It appears that the appellant has waited until he exhausted all appeals against the conviction to agitate his appeal against sentence after more than 09 years. This time, he appears to be seeking an enlargement of time to file an appeal against sentence. The President, CA on 30 October 2019 had directed the registry to trace the appeal record. The appellant had filed written submissions which had been received on 16 December 2019 and the respondent had responded on 31 December 2019.

[6] Since the appellant had filed a timely notice of appeal against sentence there is no need for him to seek enlargement of time. However, in terms of section 21(1)(c) of the Court of Appeal Act, he could appeal against sentence only with leave of court. Therefore, the matter was taken up for hearing for leave to appeal on 31 March 2020.

[7] The Court of Appeal has rightly raised the bar in timely leave to appeal applications by applying the test of **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87. This threshold is the same with leave to appeal applications against conviction as well as sentence.

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled. In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court following the decisions in **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 set out the sentencing errors that could trigger the leave to

appeal decision. 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 against sentence to be considered arguable there must be a reasonable prospect of its success in appeal. The said 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.

> *'(1) That the learned trial judge erred in law and in fact in not deducing the 01 year and 08 months spent in custody from 11 January 2010 to 09 September 2011 as time already served.*
>
> *(2) Disparity of sentence*
>
> *(3) That the non-parole is too close to the head sentence.'*

01st ground of appeal- period spent in custody.

[10] The paragraphs relevant to the appellant's complaint are 10 and 11 of the sentencing order dated 09 September 2011. They are as follows

> *'10. The mitigating factors are as follows:*
>
> *(i) Serevi, you are 25 years old, single and working as a seaman. You have being remanded in custody for 1 year 8 months.*
>
> *(ii) Ropate, you are 22 years old, married (de-facto) with two young kids. You have being remanded in custody for 1 year 8 months.*
>
> *(iii) Samuela, you are 25 years old, married with two young children. You have being remanded in custody for 1 year 8 months.*
>
> *11. I sentence you as follows:*
>
> *(i) On count No. 1, I start with a sentence of 8 years imprisonment. For the aggravating factors, I add 7 years, making a total of 15 years imprisonment. For the mitigating factors, I deduct 2 years, leaving a balance of 13 years*

imprisonment. Serevi and Ropate, I sentence each of you to 13 years imprisonment each.

(ii) On count No. 2, Serevi and Ropate, I sentence each of you, to 4 months imprisonment each.

(iii) On count No. 3, Serevi and Ropate and Samuela, I start with a sentence of 7 years imprisonment. For the aggravating factors, I add 5 years, making a total of 12 years imprisonment. For the mitigating factors, I decrease the sentence by 2 years, leaving a balance of 10 years imprisonment. On count No. 3, I sentence each of you, to 10 years imprisonment.

(iv) On count No. 4, I repeat the above process and sentence, for each of you.

(v) On count No. 5, I sentence you Serevi to 3 months imprisonment."

[11] Therefore, it is clear that the learned trial judge had considered the appellant's period of remand as part of the mitigating factors though it did not accord with the best sentencing practice.

[12] Section 24 of the Sentencing and Penalties Decree 2009 states that

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

[13] **Koroitavalena v State** [2014] FJCA 185; AAU0051.2010 (5 December 2014) the Court of Appeal held

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

[14] However, unlike in the present case in ***Koroitavalena*** the period spent in remand by the Appellant before trial was 9 months and no reasons have been given by the trial Judge for not deducting the said period when imposing the sentence. Thus, the Court of Appeal deducted the said period from his sentence.

[15] **Waisale v State** [2015] FJCA 117; AAU0081.2013, AAU00129.2013, AU0042.2014 (19 June 2015) Gounder J remarked

> *'[7] Separate discounting of the* ***remand period*** *does not involve any principle. Separate discounting is done as a matter of practice and not as a matter of law. The law requires the* ***remand period*** *to be taken into account in sentence. In this case, the trial judge did take Nalulu's* ***remand period*** *into account when sentencing him.*

[16] In **Raj v State** [2014] FJSC 12; CAV0003 of 2014 (20 August 2014) the Supreme Court stated:

> '[66] ..... The Court of Appeal in its judgment at paragraph 18 said:
>
> *".....There can be no fault in the sentencing approach of the learned Judge referred to above (in para 13), save as to say we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve."*
>
> *We indorse those remarks.'*

[17] Therefore, the trial judge had erroneously considered the appellant' marital status and being a father of two children as mitigating factors. If that factor is disregarded what is left under mitigating factors is only his period of remand of 01 year and 08 months and the trial judge's deduction of 02 years from the sentence for mitigating factors should necessarily be deemed to the discount or credit for his period of remand which was more than the actual period of remand in arriving at the final sentence.

[18] In **Saurara v State** [2008] FJCA 43 CAV0020 of 2007 (26 February 2008) the Supreme Court held that the court has power to dismiss an appeal if satisfied that a correct exercise of discretion would have yielded the same result as that reached by the sentencing court.

[19] Thus, there is no sentencing error falling into any of the errors set out in ***Naisua*** and there is no reasonable prospect of the appellant succeeding in appeal.

02nd ground of appeal – disparity of sentence

[20] The appellant argues that the learned trial judge had sentenced another co-accused called Iowane Salacakau to 07 years of imprisonment with a non-parole period of 06 years.

[21] After Iowane Salacakau pleaded guilty, the trial judge had reasoned out the sentence on him as follows in the sentencing decision on 11 November 2010 according to the leave ruling in **Salacakau v State** [2013] FJCA 61; AAU0057 of 2011 (1 July 2013) where extension of time had been refused.

> *'8. The mitigating factors in your case were as follows:*
>
> *(i) You pleaded guilty to the charges, four months after first call, and as result, you saved the court's time;*
>
> *(ii) You are 18 years old, and this is your first conviction. However, this mitigation factor is somewhat "watered down" by the fact that you have five pending cases in the Magistrates Courts, that is, Case File No. 1579/09 (robbery with violence etc.); Case File No. 974/09 (store room breaking, entering and larceny); Case File No. 1989/08 (burglary) and two other cases in the Juvenile Court.*
>
> *(iii) Your parents separated when you were 5 years old, and you reached Form 4 level education only;*
>
> *(iv) You have been remanded in custody since 11th January 2010, that is, 10 months;*
>
> *(v) None of the three "robbery with violence" complaints were seriously injured during the offence, although Stephen John Paul was bruised in the wrist and received cuts to his forearm and neck.*
>
> *9. The aggravating factors were as follows:*
>
> *(i) You committed three "robbery with violence" within 24 hours, one in Stephen John Paul's home, and two at different service stations in Walu Bay and Vivrass Plaza;*
>
> *(ii) By robbing 64 year old Stephen John Paul in his own home, at 8.45 pm, you showed utter disregard to his personal safety and his right to peaceful enjoyment of his home;*
>
> *(iii) By robbing the two service stations, you showed utter disregard for*

people's right to earn their living honestly, and to serve the public peacefully;

(iv) By offending in a group, you intimidated the complainants, and in the case of the two service stations, other members of the public;

(v) Most of the stolen properties had not being recovered;

(vi) You committed these offences, while you were on bail on five pending cases in the Magistrates Court [see mitigating factor (ii) in paragraph 8(ii) hereof];

(vii) By committing these serious offences, you have demonstrated your inability to live peacefully in the community, and your continued desire to take a free ride on the hard work of others.

10. On Count No.1, I start with a sentence of 6 years imprisonment. For the aggravating factors, I add 4 years, making a total of 10 years imprisonment. For the mitigating factors, I deduct 3 years, leaving a balance of 7 years imprisonment.

[22] The trial judge also set out the aggravating factors in the appellant and the other two accused in the sentencing order dated 09 September 2011 as follows.

'9. The aggravating factors in this case were as follows:

(i) For you Serevi and Ropate, you began your crime spree by committing a serious home invasion. Sixty four year old Stephen John Paul was enjoying the comfort of his home on 6th January 2010, after 8.45pm. He was busy with his laptop computer, in his sitting room. Like every citizen of Fiji, he has every right to feel secure and comfortable in his sitting room in his own house. A citizen's house is a place of refuge. However, you two deliberately turn his night into a living hell at that time. You invaded his house, threatened to injure him with a pinch bar, and tied him up with electrical cords. You made him a prisoner in his own home. Then you ransacked his house. You then stole $5,960 worth of his properties, the details of which are itemized in count No. 1. By doing the above, you two showed utter disregard to Stephen John Paul's rights to enjoy his house in peace. By stealing his properties, you two showed utter disregard to his property rights.

(ii) Serevi and Ropate, after violently robbing Stephen John Paul, you two unlawfully used his motor vehicle registration No. DP 748,- without his permission, as a get-away vehicle. By committing this crime, you two once again showed your utter disregard to Stephen John Paul's property rights.

(iii) Serevi and Ropate, you then brought Samuela into the fold. You then jointly robbed Niranjans Service Station on 7th January, 2010. You jointly threatened its attendant with a pinch bar, and stole properties therefrom, valued at $634. You then jointly fled in Stephen John Paul's car. Service

stations provide an essential service to the travelling public, and those who violently rob them show utter disregard to the rights and comfort of the travelling public, let alone the property rights of the service station owners.

(iv) Serevi, Ropate and Samuela, after robbing the Niranjan Service Station, you then jointly decided to rob the Vivrass Total Service Station, on the same day. You jointly carried out the same type of violent act you did on Niranjan Service Station. You jointly stole $399. In effect, you, as a group, carried out two violent robberies on two different service stations, in a day. By these actions, you have chosen to live outside the law. You showed utter disregard to the complainant's safety and property rights.

[23] In **Wise v State** [2014] FJCA 184; AAU0020.2011 (5 December 2014) the Court of Appeal examined the principle of disparity of sentence and stated

'[25] Archibald, [1997] part 5-106 pg 597 States thus;

*" **Disparity of sentence** may occur in a number of different forms. The most obvious is where one co-defendant receives a more severe sentence than the other, when there is no good reason for the difference (R v Church, 7 Cr. App. R (S.) 370 C.A. There may equally be disparity when the defendants receive identical sentences, despite relevant difference in their culpability or personal circumstances, R v Sykes, 2 Cr. App. R(S.) 173, C.A.; R v. Good- acre [1996] 1 Cr. App. R (S.) 424 C.A.*

Furthermore, "a failure to distinguish in favor of a defendant who has pleaded guilty will normally amount to disparity. There may equally be disparity where the difference between the sentences imposed on two defendants either exaggerates the difference in their culpability or personal circumstances, or is insufficient to mark the difference, R. v. Tilley, 5 Cr. App. R.(S.) 235, CA; R v Griffiths [1996] 1 Cr. App. R. (S.) 444, CA.

Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious.

***It has been said that the court would interfere where "right-thinking members of the public, with full knowledge of the relevant facts and circumstances, [would] consider that something had gone wrong with the administration of justice" (per Lawton L.J. in R. v Fawcett, 5 Cr. App. R.(S.)158, CA; but this was rejected, as providing little guidance as to those cases in which the court's sense of injustice would be so offended that it would interfere, in R. v. Coleman and Petch, unreported, October 10, 2007, CA ([2007] EWCA Crim. 2318),** where it was said that there was no identifiable principle on which the court would intervene on this ground. Certainly, there are cases where the court has refused to interfere with proper sentences by reference to the good fortune of another offender, where that*

other offender has received a lenient sentence for no apparent reason (R. v. Tate (2006)150 S.J. 1192, CA) or, despite having been alleged to have been more deeply involved than the appellant, has been convicted of a lesser offence for lack of evidence (Coleman and Petch, ante).

The court will not make comparisons with sentences passed in the Crown Court in cases unconnected with that of the appellant (see R. v. Large, 3 Cr. App. R. (S.)80, CA).There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see R.v. Stroud, 65 Cr. App. R. 150, CA. It appears to have been ignored in more recent decisions, such as R. v. Wood, 5 Cr. App. R. (S.) 381, CA, Fawcett, ante, and Broadbridge, ante.

The present position seems to be that the court will entertain submissions based on ***disparity of sentence*** *between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in Fawcett is satisfied.*

Archbold, 2012, 5-159, pgs. 608 – 609 (Emphasis added).

[24] Therefore, it is clear that there had been clearly different considerations applicable in the matter of sentence on Iowane Salacakau to those of the appellant. The difference in the sentences does not meet the high threshold articulated in ***Wise.*** A mere arithmetical difference would not help the appellant. The trial judge cannot be said to have violated the principle of disparity of sentence. This ground of appeal has no reasonable prospect of success in appeal.

03rd ground of appeal – non-parole period is too close to the head sentence.

[25] The complaint of the appellant is that the non-parole period of 11 years is too close to the head sentence of 13 years and as a result not affording the appellant the opportunity to rehabilitate. In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal examined a similar argument extensively having considered all previous authorities on this matter. The issue before court and its observations were stated as follows.

'[89] The Learned Trial Judge while sentencing the Appellant to 17 years imprisonment had fixed the period during which he is not eligible to be released as 16 years in terms of section 18(1) of the Sentencing and Penalties Decree. Section 18(4) states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 16 years fixed by the Trial Judge is in compliance with section 18(4)'

'[90] However, the complaint of the Appellant is that the non-parole period of 16 years has the effect of denying or discouraging the possibility of rehabilitation and is inconsistent with section 4(1) of the Sentencing and Penalties Decree and the decision in ***Tora v State*** *AAU0063 of 2011:27 February 2015 [2015] FJCA 20.'*

'[114] The Court of Appeal guidelines in ***Tora*** *and* ***Raogo*** *affirmed in* ***Bogidrau*** *by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

'[128] Acting under section 23(3) of the Court of Appeal Act I hold that the sentence of 17 years imposed by the trial judge should be quashed. In lieu thereof, the appellant should be sentenced to 15 years imprisonment with a non-parole period of 13 years, effective from 11 July 2014.'

[26] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.***"

'.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.

[27] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

"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."

[28] It must also be pointed out that the arguments taken up earlier based on the calculation of remission *vis-à-vis* the non-parole period have been put to rest by the Corrections Service (Amendment) Act 2019. It states

> *'2. Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*
>
> *"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.*
>
> *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.".*
>
> *Consequential amendment*
>
> *3. The Sentencing and Penalties Act 2009 is amended by—*
>
> *(a) in section 18—*
> *(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and*
> *(ii) deleting subsection (2); and*
>
> *(b) deleting section 20(3).*

[29] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in

operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

[30] The changes introduced by the Corrections Service (Amendment) Act 2019 to the non-parole regime are in accord with the decisions in ***Natini*** and ***Raogo***. However, the amendment has negated the following aspects of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22

> (i) *fixing a non-parole period is quite a drastic power and to make it reasonable, it should be exercised by a Court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. (per Lokur,J)*
>
> (ii) *The power to fix a non-parole period should be exercised by the Courts in exceptional cases and circumstances and where it is absolutely necessary to do so and when that power is exercised it must be preceded by a hearing and supported by reasons. (per Lokur,J)*

[31] Corrections Service (Amendment) Act 2019 on the other hand has affirmed the following direction by the Supreme Court in ***Timo***

> *'The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court and the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period ought to be discontinued forthwith. (per Lokur,J)*

[32] Gates, J remarked in ***Timo*** as follows

> *'judicial officers need to justify the imposition of non-parole periods close to the head sentence, or*
>
> *indeed for the decision not to impose one at all,*
>
> *for section 18(1) speaks in terms of "must fix a period..." (per Gates,J)*

[33] Corrections Service (Amendment) Act 2019 has left the first part of the above observation intact while it has clearly rendered the second part irrelevant. The last comment on section 18(1) of the Sentencing and Penalties Act 2009 has been affirmed by the amendment.

[34] Therefore, I hold that the gap of 02 years between the final sentence and the non-parole period cannot be said to violate any statutory provisions or is obnoxious to the judicial pronouncements on the need to impose a non-parole period. The 02 year gap is not too close to the head sentence and justified given the facts and circumstances of the case against the appellant. This ground too has no reasonable prospect of success.

[35] Accordingly, leave to appeal is refused.

Order

1. Leave to appeal against sentence is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL