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

CRIMINAL APPEAL NO.AAU 032 of 2017
[Magistrates Court Criminal Case No. HAC 886 of 2011]

BETWEEN

: **LEONE VAKARUSAQOLI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **14 May 2020**

Date of Ruling : **20 May 2020**

RULING

[1] The appellant along with Joeli Tawatatau (the appellant in AAU 040 of 2017) had been indicted in the High Court but tried in the Magistrates court in Nausori under extended jurisdiction on a single count of robbery contrary to section 311(1)(a) of the Crimes Decree. The charge against the appellant was as follows.

'***Count one.***

Aggravated Robbery*, contrary to Section 311 (1)(a) of Crimes Decree Number 44 of 2009.*

The ***Particulars of Offence*** *is that:*

*"****Joeli Tawatau and Leone Vakarusaqoli*** *on the 31st day of March, 2011, at Naduru Road, Nausori in the Central Division, immediately before committing*

theft, used force and robbed Ravin Prasad of assorted jewelleries valued $9500.00 cash $200.00, one easy-telephone valued $90.00, one nokia phone valued at $50.00, one Samsung mobile valued at $2000.00 and all to the total value of $12140.00."

[2] After trial, the learned Magistrate found the appellant guilty in his judgment dated 27 June 2016. The appellant was sentenced on 29 May April 2017 to an imprisonment of 09 years with a non-parole period of 08 years.

[3] The appellant in person had appealed against conviction and sentence within time on 21 June 2017. The appellant had also filed an application for bail pending appeal on 25 February 2020. Legal Aid Commission appearing for the appellant had filed an amended notice of appeal against conviction (02 grounds of appeal) and sentence (one ground of appeal) along with an application for bail pending appeal, a supporting affidavit and written submissions. The State had tendered its written submissions on 05 May 2020.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test applicable is **'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 timely leave to appeal applications against conviction as well as sentence.

[5] 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 in a timely appeal 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.*

[6] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

> *'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*
>
> *[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*
>
> > *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
> >
> > *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*

[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:

> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal hearing;*
>
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

*[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

*[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of **bail pending appeal**. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

*[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

*"The likelihood of success has always been a factor the court has considered in applications for **bail pending appeal** and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in*

*the manner in which the court determines the question and <u>the courts in Fiji have long required a very high likelihood of success</u>. <u>It is not sufficient that the appeal raises arguable points</u> and <u>it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it</u>."*

*[31] It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] In **<u>Ratu Jope Seniloli & Ors. v The State</u>** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that <u>the likelihood of success must be addressed first</u>, and the <u>two remaining matters in S.17(3)</u> of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* <u>are directly relevant</u> *<u>' only if the Court accepts there is a real likelihood of success'</u>* otherwise, those latter matters *'are otiose'* (See also **<u>Ranigal v State</u>** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[8] In **<u>Kumar v State</u>** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[9] In **<u>Qurai v State</u>** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

'<u>It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered</u>. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).

On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'

[10] In ***Balaggan*** the Court of Appeal further said that '*The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant*'

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[12] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30]........All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ... ."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *"The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[14] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

Grounds of appeal

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

> '***Ground One***
>
> *THE Learned Resident Magistrate erred in law and fact when he failed to properly assess the Appellants admissions in the caution interview at hearing stages rather, he re-iterated that the admissions in the caution interview had been admitted which was improper and raises an arguable error made by the Learned Magistrate.*
>
> ***Ground Two***
>
> *THE Learned Resident Magistrate erred in law and fact when he failed to properly assess the lack of evidence on the identification of the Appellant and convicting the Appellant with no identification evidence at all which was improper and raises an arguable error made by the Learned Magistrate.*
>
> ***Appeal against Sentence***
>
> ***Ground Three***
>
> *The non-parole period set by the Resident Magistrate is too close to the head sentence thus making the sentence harsh and excessive and not in line with the principles of rehabilitation.*'

01st ground of appeal

[18] The appellant's complaint under appeal ground 02 is based on the following paragraph of the judgment of the Magistrates court where the appellant was the 02nd accused.

> *'The caution interview of the 2nd accused which was admitted in evidence after the voir dire details the robbery, the actions of the 1st accused and the role of the 2nd accused. The evidence in Court by the prosecution witnesses is a series of links, which form the chain of evidence. The evidence of the prosecution witnesses ties together. There are no gaps in the evidence which do not link up and complete the chain. This Court accepts the evidence of the prosecution witnesses. All the elements of the offence the accused are charged with are proven by the prosecution.*

[19] The argument of the appellant is that the above paragraph shows that the trial judge had simply adopted the *voir dire* ruling as to the admissibility of the appellant's cautioned interview in the judgment without the same being assessed once again after trial proper in convicting the appellant. He relies on the decision in **Maya v State** [2015] FJSC 30:CAV009 of 2015 (23 October 2015).

[20] In **Maya v State** [2015] FJSC 30; CAV 009, 2015 (23 October 2015) his Lordship Chief Justice Gates (as his Lordship then was) said

> *'**2.**For my part, I reach the view that the assessors should be directed by the judge in his summing up that if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether.*
>
> *'3. In Fiji the judge may admit the confession into evidence after the voir dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at a different opinion. The defence may pursue in cross-examination in the trial proper the same issues of involuntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation. The prosecution however bears the burden in the trial proper, as in the voir dire of proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with all other elements of proof required to prove the charge. The position in **Mushtaq** [2005] UKHC 25 is to be preferred to that of **Chan Wei Keung v The Queen** [1967] 2 AC 160.*

4. Where such litigation issues continue and remain alive into the trial proper, the judge's opinion on this important matter should be referred to in the judge's judgment following the tendering of the opinions of the assessors, irrespective of whether the judge conforms with those opinions or not [section 237(2) Criminal Procedure Decree]……...'

[21] In ***Maya*** Keith J. with whom Dep, J agreed opined

> *'21 .... In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not. By then, of course, the judge will have ruled the confession to have been admissible. He will therefore have already found beyond reasonable doubt that it had been made voluntarily. If he remains of that view by the end of the case, the terms of the direction he gave to the assessors if they thought that the confession may have been made involuntarily is irrelevant. The problem will only arise if, in the course of the trial, the judge himself changes his original view about the voluntariness of the confession. Should he direct himself to disregard the confession altogether?*
>
> *'23…..Judges should for the time being, therefore, tell the assessors that even if they are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily. I am not unmindful of the irony here. The judge will have to direct himself on these lines if he changes his mind about the voluntariness of the confession in the course of the trial. If he does that, there will never be case in which the issue which we have identified will come up for final determination. But that is sometimes the way things go*

[22] What can be gathered from the majority view of Maya is that the trial judge should place the issue of voluntariness of a confessional statement before the assessors and also direct himself on the issue of voluntariness at the end of the trial (*i.e.* in the judgment) only if the judge changes the mind in the course of the trial, for the trial judge had already decided the confession to have been made voluntarily at the *voir dire*. The minority view is that in any event the issue of voluntariness should be placed before the assessors if the issue remained alive at the trial and in addition the trial judge should record his own opinion on it in the judgment.

[23] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal said analyzing previous decisions including ***Maya***

> *'The correct law and appropriate direction on how the assessors should evaluate a **confession** could be summarised as follows.*

(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide ***Volau v State*** *Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*

(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the ***confession*** *(vide* ***Volau****).*

(iii) Once a ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the* ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau****).*

(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) However, ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the* ***confession*** *is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[24] It is an important question of law as to whether the same principles would apply *mutatis mutandis* to a trial by the judge (without assessors) who has admitted a confessional statement at the *voir dire* as having been made voluntarily but the accused has continued to agitate the issue of voluntariness and kept that alive at the trial. Going by the existing decisions including ***Maya*** the learned Magistrate need not have gone into the question of voluntariness in his judgment unless he had changed his mind during the trial. What about the issues as to whether the accused made the confession, it is true and sufficient for the conviction (i.e. the weight or probative value)?

[25] However, the matter does not end there. Even if the trial judge has not changed his mind during the trial proper on the confession being voluntary, should the trial judge in the absence of assessors not have addressed his mind in the judgment to the issue as to whether the confession is true and sufficient for the conviction (i.e. the weight or probative value) as required in a trial with assessors? To me this sounds an important question of law.

[26] The trial judge seems to have considered the appellant's allegations of police assault and the evidence of the police officers to the contrary presumably in relation to the issue of voluntariness without indicating that any new material had emerged in the course of the trial which made him doubt his original view at the *voir dire*. His reasons are as follows.

> '*Both the prosecution witnesses (PW-1 and 2) answered the questions by the counsels in cross-examination and were not discredited. The Court believes their version of events. The Court further believes from their evidence that the 1st accused fled after throwing the bag and he was arrested later. The Police officers had to use force to arrest the accused. The Court has noted from the medical of the 1st accused that he received injuries whilst being arrested. This Court further believes the Police Officers that the accused evaded arrest and they had to chase and apprehend the accused. According to the prosecution witnesses the accused punched the police officers and the Court believes that the injuries the accused received were from him evading police and the police using reasonable force in arresting the accused. The Court finds from the evidence before it that the injuries were from the time the police arrested the accused but not separately inflicted.*'

[27] Yet, the learned Magistrate does not appear to have specifically addressed his mind to the issue of whether the confession is true and sufficient for the conviction (i.e. the weight or probative value) in the judgment as required in a trial with assessors though some implied indication to that effect can be seen. This is an important question of law to be clarified by the Full Court for future guidance though the absence of such an express consideration would not be fatal to the conviction if the evidence at the trial justifies the verdict. Leave is not required in this connection.

[28] However, as a matter of formality I grant leave to appeal on the above question of law but I am not inclined to conclude that the answer to that question would lead to a 'high likelihood of success' in his appeal required in the grant of bail pending appeal.

02nd ground of appeal

[29] The appellant argues that the learned Magistrate had not properly assessed the lack of identification of the appellant. The importance of establishing the identity of the accused need not be overemphasized (see **Nalave v State** [2019] FJCA 27; CAV0001 of 2019: 01 November 2019)

[30] However, the learned Magistrate has stated in the judgment *'The caution interview of the 2nd accused which was admitted in evidence after the voir dire details the robbery, the actions of the 1st accused…'*. Thus, when the caution interview was admitted in evidence it established the identity of the appellant beyond reasonable doubt. Any challenge to the admissibility of the caution interview is covered under the first ground of appeal and the second ground of appeal cannot exist independently.

[31] Hence, my conclusion that there is no reasonable prospect of success in this ground of appeal and leave to appeal should be refused and refusal of leave to appeal should lead to the logical conclusion that this ground of appeal does not have a very high likelihood of success as required for bail pending appeal.

03rd ground of appeal (sentence)

[32] The appellant complains that the non-parole period is too close to the sentence thus making the sentence harsh and excessive and the non-parole period denies him the chance of rehabilitation.

[33] 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.'*

[34] 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 as in the current case was set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) as 08-16 years of imprisonment.

[35] The learned Magistrate though not referring to ***Wise*** had taken 09 years as the starting point and after adjusting for aggravating and mitigating factors he had arrived at the final sentence of 09 years of imprisonment with a non-parole period of 08 years for robbery which is a legal sentence in every sense.

[36] It appears that the trial judge had not fixed the lower starting point with the objective seriousness of the offence in mind (vide **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). He seems to have wanted to limit the ultimate sentence to 10 or less number of years of imprisonment. Therefore, the appellant cannot complain of the non-parole period of 08 years which perhaps reflected the unspoken thinking on the part of the learned Magistrate for the sentence at this lower end to carry an element of deterrence.

[37] In **Singh v State** [2016] FJCA 126; AAU009.2013 (30 September 2016)the Court of Appeal remarked

> *'I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.'*

[38] When an appellant receives a less than usually low sentence he is not entitled to complain about the short gap between the head sentence and the non-parole period, for the requirement for rehabilitation is assumed to be inbuilt in the head sentence. In any event, the Full Court may revisit the sentence in the light of section 23(3) of the Court of Appeal Act if and when it comes up before it for determination in due course.

[39] Coming back to the appellant's complaint, 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'.*

[40] 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."*

[41] 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).*

[42] 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.

[43] 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)*

[44] 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)*

[45] 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)*

[46] 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.

[47] Therefore, I hold that the gap of 01 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 01 year gap in this case is not too close to the head sentence and justified given the facts and circumstances of the case against the appellant.

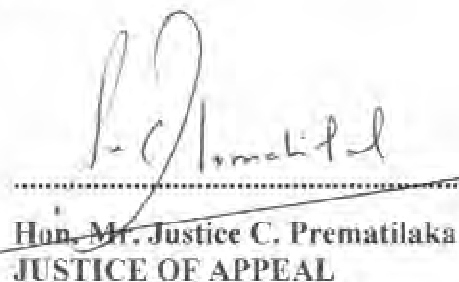
[48] This ground too has no reasonable prospect of success to be given leave to appeal. Nor does it have a 'high likelihood of success' to consider bail pending appeal.

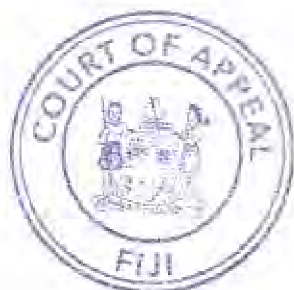
[49] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

[50] Before parting with this ruling, I feel constrained state as an observation that given the fact that this case was an aggravated robbery involving home invasion in the night with accompanying violence, it should not have been referred to the Magistrates court to try the appellant under its extended jurisdiction. The High Court judges should exercise more care and vigilance in investing the magistrates with jurisdiction to try indictable offences under section 4(2) of the Criminal Procedure Act, 2009.

Orders

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.
2. Bail pending appeal is refused.





Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL