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

CRIMINAL APPEAL NO.AAU 122 of 2017
[In the High Court at Suva Case No. HAC 013 of 2017]

BETWEEN	:	**WAISEA MOTONIVALU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**04 March 2021**
Date of Ruling	:	**05 March 2021**

RULING

[1] According to the sentencing order, the appellant had been indicted in the High Court of Suva on a single count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 committed on 01 January 2017 at Lokia, Rewa, in Central Division.

[2] The particulars of the offence read as follows.

> *"Waisea Motonivalu and others on the 1st day of January 2017, at Lokia, Rewa, in Central Division, in the company of each other robbed Jai Prasad of a 15 Horsepower Yamaha Outboard Engine valued at $5,950."*

[3] The appellant had pleaded guilty on 24 March 2017 on his own free will and the trial judge having been satisfied that the appellant had fully comprehended the legal effects of his plea and that it was voluntary and free from any influence, had convicted him.

He had been sentenced on 21 May 2019 to 09 years and 07 months of imprisonment with a non-parole period of 08 years and 07 months.

[4] The appellant being dissatisfied with the conviction and sentence had submitted an untimely notice of appeal and application for leave to appeal on 18 August 2017. The delay is about 02 months. He had tendered an application to abandon the conviction appeal on 03 April 2019. The Legal Aid Commission (LAC) had filed an amended notice of appeal canvassing only the sentence and written submissions on 19 June 2020. It had also tendered a notice of motion seeking bail pending appeal and written submissions on 03 August 2020. However, perhaps upon realizing that the appellant had pleaded guilty to the charge of murder in the same case earlier and the court had convicted and sentenced him to life imprisonment with a minimum serving period of 20 years, the LAC withdrew from the case and the appellant is pursuing the matter in person. The state had filed its submissions on 23 October 2020.

[5] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.'*

[6] The state had not raised any objection to the appeal on the basis of delay and given that the delay is about 02 months and the appellant had appealed in person, I am inclined to consider his appeal as a timely appeal.

[7] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (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, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to

distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[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 timely preferred against sentence to be considered arguable there must be a reasonable 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.*

[9] The only ground of appeal against sentence is as follows.

> ***Ground 1:***
>
> *That the sentence imposed on your appellant is harsh and excessive in light of the non-parole term being set too close to the head sentence.*

[10] The sentencing order reveals the following facts.

> *3. It was revealed in the summary of facts, which you admitted in open court that you were drinking home-brew with other accomplices on the 31st December 2016 at Turaki Settlement in Lokia. At about midnight, when the home brew finished, you and your accomplices planned to steel the outboard engine owned by the victim and sell it in order to buy more alcohol, so that you can continue the drinking party.*
>
> *4. You went to the victim's house and knocked the door. When he opened the door, you asked him for a cigarette, while others were hiding. When the victim said that he has no cigarette, you forcefully entered into the house and started to punch him in order to keep him quiet. The victim managed to escape and run out of the house. You got hold of him and dragged him to the bushes.*

While you were in the bushes with the victim, other accomplices went to his house to get the engine. You also later joined them in order to take the engine out.

01st ground of appeal

[11] The appellant argues that he being a first offender should have been given a lesser non-parole period by the trial judge. In other words his contention is that the non-parole period is too close to the head sentence.

[12] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal stated

*'[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.'*

[13] 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."

[14] 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'.

[15] Thus, the non-parole period of 08 years and 07 months (when the head sentence was 09 years and 07 months) fixed by the trial judge is in compliance with section 18(4). He had considered many mitigating factors including the appellant being a first offender in the sentence order. Therefore, the gap of 01 year between the final sentence and the non-parole period cannot be said to have violated any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period. The 01 year gap between the head sentence and the non-parole period is reinforced by the disturbing circumstances which I shall advert to later in the ruling.

[16] Before that, it is pertinent to note that 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.

[17] Therefore, there is no sentencing error or any prospect of success in appeal of the ground of appeal against sentence.

[18] The state has submitted that the appellant had been charged for murder in the same case HAC 013 of 2017. The deceased had been the inmate of the house whom the appellant caught while escaping and dragged to the bushes while the others robbed the deceased's house. Subsequently, the deceased had been stomped to death.

[19] The appellant had pleaded guilty for the murder of the said inmate of the house on 01 November 2016 and been sentenced to death with a minimum serving period of 20 years. He had not divulged at all his guilty plea for murder and the life imprisonment which he is currently serving in his affidavit filed in support of his bail pending application. He appears to have suppressed it from his previous lawyers namely the Legal Aid Commission and clearly attempted to suppress it from this court.

[20] In the circumstances, his current appeal against sentence imposed for aggravated robbery and bail pending appeal application is not only devoid of any merits but also frivolous and vexatious.

[21] Therefore, the appellant's appeal against sentence should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

Orders

1. Leave to appeal against sentence is refused.
2. Bail pending appeal is refused.
3. Appeal against sentence is dismissed in terms of section 35(2) of the Court of Appeal Act

COURT OF APPEAL

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL