IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

Petition for Special Leave to Appeal No: CAV0021/2014 [from the decision of the Single Judge of the Court of Appeal, Crim. App. Nos. AAU0078 of 2011 and AAU0088 of 2012]

[High Court HAC198 of 2010 and HAC193/10, HAC194/10]

BETWEEN: **WAISAKE TUIMEREKE**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Chief Justice Anthony Gates,**
President of the Supreme Court
The Hon. Mr. Justice Saleem Marsoof PC,
Judge of the Supreme Court
The Hon Mr. Justice Buwaneka Aluwihare PC,
Judge of the Supreme Court

Counsel: **Mr. S. Sharma, Director, Legal Aid Commission for the Petitioner**
Mr. L. Fotofili for the Respondent

Date of Hearing: **Friday 10th April 2015**

Date of Judgment: **Friday 24th April 2015**

JUDGMENT OF THE COURT

Gates P

[1] This case turns on the procedural issue of the necessity for prior consideration by the Court of Appeal of the enlargement of time application which attracts different criteria compared with those applicable for an application for leave to appeal simpliciter.

[2] The petitioner has made a timely appeal to this court.

[3] He is concerned about the totality of his various sentences, and alleges a failure by the High Court sentencing judge to comply with Section 20(2)(a) of the Sentencing and Penalties Decree. That section entitled *"Fixing new non-parole period for multiple sentences"* states as follows:

> 20(1) If a court has sentenced an offender to a term of imprisonment with a non-parole period and the offender is sentenced to a further term of imprisonment before the expiration of the non-parole period, the court must fix a new single non-parole period in respect of all sentences the offender is to serve or complete.
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> (2) The single new non-parole period fixed at the time of the subsequent sentence -
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> (a) supersedes any previous non-parole period that the offender is to serve or complete; and
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> (b) must not be such as to render the offender eligible to be released on parole earlier than would have been the case if the subsequent sentence had not been imposed.
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> (3) Nothing in this section prevent(s) a court from exercising its power under section 18(2) to decline the fixing of a non-parole period in relation to the subsequent sentence.

[4] The petitioner had been sentenced in several separate cases. They can be tabulated as follows:

> **Case No. 776/08** (Nasinu Magistrates' Court)
> Robbery with violence (home invasion) – 2 years imprisonment suspended for 3 years.
> Date sentence imposed – 6 October 2008.

Case Nos. 71/2010, 72/2010 & 74/2010
Office breaking entering and larceny – 2 years imprisonment
Robbery with violence (home invasion) – 7 years imprisonment
Robbery with violence (home invasion) – 8 years imprisonment
All terms made concurrent
Non-parole period – 6 years
Date sentence imposed – 21 February 2011.

Case No. HAC198/2010
Robbery with violence (home invasion) – 7 years imprisonment
Robbery with violence (home invasion) – 7 years imprisonment
Robbery with violence (home invasion) – 7 years imprisonment
All terms made concurrent but the total made consecutive to the pre-existing 8-year term.
No non-parole period fixed
Date sentence imposed – 23 June 2011
Appeal filed on 3 August 2011 (AAU0078/10). Delay in filing appeal – 2 weeks.

Case Nos. HAC192/2010 and HAC194/2010
Robbery with violence – 10 years imprisonment
Robbery with violence – 10 years imprisonment
Robbery with violence – 10 years imprisonment
All terms made concurrent
Non-parole period – 8½ years
Date of sentence – 4 November 2011
Appeal filed on 14 August 2012 (AAU0068/12). Delay in appealing – 8 months.

[5] Before the single judge of appeal in the Court of Appeal the petitioner sought leave to appeal against sentence.

[6] He raised 2 grounds of appeal. First he had argued that there was disparity in the sentences imposed on the offenders in Magistrate's Court Case No. 1149/2009 for a home invasion robbery. In that case the 3 offenders were sentenced as follows:

Mana Vula	-	3 years imprisonment
Iowane Benedito	-	3 years imprisonment
Ravuama Kedraika	-	4 years imprisonment.

[7] His lordship dealt with the ground by saying [at para 4]:

> "The individual sentences imposed in the Case No. 1149/2009 cannot be compared with the spate of offences committed by the appellant. The parity principle has no application to the appellant's total sentence which is for multiple offending."

[8] The second ground was that the Department of Corrections had incorrectly calculated his total sentence as 25 years when it should have been 15 years.

[9] The single judge agreed and said [at para 7]:

> "In the last case, the learned judge said the total term of 10 years imprisonment was to commence on 4 November 2011. This meant that the sentence was to be served concurrently with the pre-existing sentence effective from 4 November 2011. So the Department of Corrections' calculation of the total sentence appears to be incorrect."

[10] This meant that the total head sentence amounted to 15 years with a non-parole period of 14½ years. His lordship went on to consider whether that total sentence fairly reflected the total criminality involved.

[11] His lordship correctly concluded that it did, and stated that the courts must adhere to the observations made by this court in ***Livai Nawalu v The State*** *CAV0012/2012* at paragraph 27-29:

> "So far as the head sentence is concerned, the court finds 13 years to be within the range set by recent authority for serious violent crime such as robbery with violence. Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour. With this type of offending, personal mitigation of the kind raised by the Petitioner, that he is married and now has a small child, count for little.

> This approach and the tariff have been established in several cases: **The State v Rokonabete** HAC118/07; **The State v Rasaqio** [2010] FJHC, HAC155/2007, **Basa v The State** [2006] FJCA 23, AAU0024/05, 24th March 2006. It was decided that the English cases were to be followed rather than the New Zealand cases since the English penalties were closer to those in Fiji's legislation.
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> In **Samuel Donald Singh v State** Crim. AAU15 and 16 of 2011 Calanchini P in the Court of Appeal said:
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> > "..... there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started at the lower end of the range"."

[12] His lordship summarized these offences as being:

> "indeed violent in nature. He (the petitioner) operated in armed gangs and attacked vulnerable victims like women and elderly in their homes. In some cases, physical violence was inflicted on the victims. The total sentence of 15 years with a non-parole period of 14 years is clearly with(in) the range of 10-16 years for spate of violent offending."

[13] Mr. Sharma as Counsel for the petitioner has jettisoned the grounds of appeal as argued before the single judge. He now raises one fresh ground:

> "The learned justice of appeal erred in law and in fact (when) he dismissed the petitioner's leave to appeal application as frivolous under section 35(2) of the Court of Appeal Act."

[14] Mr. Fofotili for the Respondent, quite properly, does not object to this fresh ground being raised at this late stage, that is along with the argument that section 20(1)(a) of the Sentencing and Penalties Decree ought to have been applied, never mind section 18(2). Section 18(1) states:

> "Subject to sub-section (2), 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."

[15] The learned trial judge in declining to impose a fresh non-parole period however appears to have omitted to observe the mandatory nature of re-casting required by section 18(1). That is when there are two existing non-parole periods in play. Here the total head sentences amount to 15 years and the non-parole period is 14½ years. Remission would only be applicable therefore on the remaining term of 6 months. On present practice, following good behaviour, the petitioner would only serve a further 4 months, i.e. a total served sentence of 14 years 10 months imprisonment.

[16] There were other arguments raised concerning whether the dismissal by the single judge of appeal as being frivolous was correct. Had the refusal of leave been simply that, a referral to the Full Court would have remained open to the petitioner. By categorizing the grounds as frivolous, no further appeal to the Full Court of Appeal was permissible, only the more arduous course of filing a petition by special leave to this court.

[17] In concluding remarks on the application, his lordship [at para 11] said this:

> "The grounds of appeal are unarguable and the length of delay in filing the appeal is significant. The appellant told the Court that he was not familiar with the appeal rules. Ignorance of law does not constitute a good cause to grant an extension of time to appeal. Furthermore, the appeal against sentence cannot possibly succeed in all circumstances of this case. In that sense the appeal is frivolous."

[18] As counsel for the petitioner rightly pointed out, this was, albeit made informally by an unrepresented incarcerated applicant, an application for leave to appeal out of time. His appeal was late in filing by 8 months or so. First there had to be a grant of enlargement of time pursuant to Rule 40 of the Court of Appeal Rules Cap. 12 before a Notice of Appeal could be entertained, and before there was a jurisdictional basis for making interlocutory orders on the appeal. Without the grant of enlargement there was no appeal afoot, or at least no provisional appeal in existence.

[19] In the circumstances the decision itself and para 11 of the single judge's decision did not address the separate and procedurally pre-eminent application. However, as was clear from the decision, the criteria for granting enlargement could not be met. With substantial delay of this order, there were no grounds raised before the judge which could be considered "a ground of merit that would probably succeed."

[20] In the circumstances I would refuse special leave, and confirm the decision of the single judge refusing leave to appeal.

Marsoof JA

[21] I have read the judgment of the President of the Court and concur with it and the proposed orders.

Aluwihare JA

[22] I have read the judgment of the President of the Court and concur with it and the proposed orders.

Gates P

[23] Accordingly the orders of the Court are:

1. Special Leave refused.
2. Orders of the single judge of the Court of Appeal refusing leave affirmed.

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Hon. Chief Justice Anthony Gates
President of the Supreme Court

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Hon. Mr. Justice Saleem Marsoof PC
Judge of the Supreme Court

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Hon. Mr. Justice Buwaneka Aluwihare PC
Judge of the Supreme Court

Solicitors for the Petitioner: Office of the Legal Aid Commission
Solicitors for the Respondent: Office of the Director of Public Prosecutions

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