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

CRIMINAL APPEAL NO. AAU 012 of 2017
[In the High Court of Suva Case No. HAC 281 of 2013]

BETWEEN	:	**PAULA VURA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. Nasedra for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**29 July 2020**
Date of Ruling	:	**30 July 2020**

RULING

[1] The appellant had been charged with two others in the High Court of Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) of the Crimes Act, 2009 allegedly committed on 19 July 2013 at Namadi Heights in the Central Division.

[2] The information read as follows.

"***FIRST COUNT***

AGGRAVATED BURGLARY: *Contrary to Section 313(1)(a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence

PAULA VURA, VERETI ISIMELI VANANALAGI, JOHNNY MAFUTUNA and ENERIKO SERU *on the 19th day of July 2013, at Namadi Heights in the Central Division broke into and entered the dwelling house of* ***SOPHIA JI*** *and* ***WEN YI*** *as trespassers with intent to commit theft therein.* ***SECOND COUNT***

Statement of Offence

THEFT*: Contrary to Section 291(1) of the Crimes Decree No.44 of 2009..*

Particulars of Offence

PAULA VURA, VERETI ISIMELI VANANALAGI, JOHNNY MAFUTUNA and ENERIKO SERU *on the 19th day of July 2013 at Namadi Heights in the Central Division dishonestly appropriated 1 Anna Klein brand wrist watch valued at $1000.00, a CK brank wrist watch valued at $150.00, 1 men's wrist watch valued at $1000.00, 1 laptop notebook and 1 Deli brank laptop together valued at $4000.00, 1 A45 mobile phone valued at $2000.00, 1 Nokia mobile phone valued at $70.00, 1 Nokia battery and charger valued at $35.00, 1 belt buckle valued at $25.00, 1 Adidas bag valued at $80.00, cash in the sum of FJD $3000.00, assorted clothes valued at $300.00 and 1 carton of Shuangxi cigarettes valued at $3325.00 all to the total value of $14,985.00 the property of SOPHIA JI and others.*

[3] The appellant had absconded since 30 April 2015 and the prosecution had applied to try him *in absentia* on 01 October 2015 and accordingly, the trial proper had commenced on 07 October 2015 in his absence. After trial, on 09 October 2015 the assessors had unanimously found the appellant guilty of the two counts as charged and delivering his judgment on the same day, the learned High Court judge had agreed with the assessors and convicted the appellant of both charges. He had been sentenced on 15 October 2015 to 4 years and 03 months of imprisonment on each count to run consecutively. Thus, the total sentence of 08 years and 06 months was directed to take effect with a non-parole period of 08 years from the time of his capture.

[4] The appellant being dissatisfied with the conviction had in person signed an untimely notice of appeal against sentence on 19 January 2017 (received by the CA registry on 30 January 2017) and tendered an affidavit dated 15 June 2017 and an application seeking extension of time on 18 August 2017. The Legal Aid Commission had thereafter filed an amended notice of appeal against conviction and sentence and

written submissions on 09 June 2020. The appellant's affidavit dated 09 June 2020 claims that his sentence appeal is out of time by about 15 months and his conviction appeal is out of time by about 25 months. However, I do not find any other appeal against conviction in the CA records other than what was filed on 09 June 2020 and therefore, the conviction appeal may be late by a few years. The respondent's written submissions were tendered at the leave to appeal hearing on 29 July 2020.

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

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

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

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

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[8] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....*

[9] Grounds of appeal against conviction and sentence are:

Ground 1 - The Learned Trial Judge erred in law and in fact in directing the assessors to look at the Appellant's caution interview when considering what the Appellants position in the case was, given the Appellant had contested the contents of his caution interview.

Ground 2 – The Learned trial Judge erred in law and in fact in finding and declaring the appellant as a habitual offender and in turn using that to sentence the Appellant to a consecutive sentence without considering and exercising his discretion in granting a concurrent sentence and in failing to consider or exercise this discretion also failed to take into account relevant consideration which would have warranted a concurrent sentence.

Ground 3 - That the sentence of 8 years 6 months with a 8 year non-parole tem is harsh and excessive given the non-parole term is too closed to the head sentence.

[10] The evidence of the prosecution as summarised by the learned trial judge in the summing-up is as follows.

'18. The prosecution's case were as follows: The accused was 40 years old on 19 July 2013. He is married with 2 daughters aged 21 and 19 years old. He is a casual labourer at the Kings Wharf, and had resided at Tamavua-i-wai Settlement most of his life. He reached Form 6 level education at Laucala Bay Secondary School. On 19 July 2013, at about 11pm, he met a friend and others at Upper Ragg Avenue Road. They had previously planned to break into the complainants' house to steal some money other valuables. They later went to the complainants' dwelling house.

19. When they arrived, the complainants were still awake. They waited at a nearby cassava patch for the complainants to sleep. Later the complainant went to sleep. The accused and his friends then cut the complainant's fence and went into their compound. They went through the back door. It was unlocked. They then ransacked the complainants' house. They woke the complainant's up and told them not to resist or they will be hurt. They demanded money.

20. They continued to ransack the house and later stole the properties mentioned in count no.2. The accused and his friends tried to escape in the complainants' vehicle, but they crashed the same against the complainant's gate. They later fled the scene on foot. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.'

01st ground of appeal

[11] The appellant argues that the learned trial judge should not have directed the assessors in paragraph 23 of the summing-up to take the appellant's position from his cautioned interview given that he had contested his cautioned interview and the trial judge's direction had preempted the assessors' decision whether to accept it or not. The appellant joins issue with what the learned judge had stated in paragraph 28 too.

[12] The appellant had attended court in connection with this case since 02 August 2013 and the trial dates of 5-16 October 2015 had been fixed in his presence on 09 May 2014. He had abstained from attending court from 30 April 2015. Therefore, the *voir dire* inquiry on 05 and 06 October 2015 had been conducted in his absence and his absence had been taken by the trial judge as him having exercised his right to remain silent. Therefore, the appellant had not contested his cautioned interview at the voir dire inquiry. The ruling on *voir dire* inquiry had been delivered on 07 October 2015 and the cautioned interview of the appellant had been held to be admissible leaving its credibility and weight to the assessors.

[13] The only evidence against the appellant had been his cautioned interview led at the trial. The trial judge had addressed the assessors on the said interview in paragraph 23 and the appellant had picked up the sentence *'To have a fair idea of what the accused's position is in this case, you will have to look at his police caution interview statements....'* for his challenge.

[14] In paragraph 28 of the summing-up the trial judge had said

'If you are of the view that the accused gave the above police caution interview statements, and he gave the same voluntarily and out of his free will, and they were the truth, you may find the accused guilty as charged on both counts. If you think otherwise, you may find the accused not guilty as charged on both counts. It is a matter entirely for you.'

[15] I think it would be grossly unfair by the trial judge to consider his summing-up on piecemeal basis. Even in paragraph 23 the trial judge had said *'In his police caution interview statements, the accused allegedly admitted the offences in count 1 and 2 of the information.'* In paragraph 24, having asked the assessors to carefully consider whether the elements of the offences had been admitted by the appellant in the cautioned interview, the judge had then directed them to consider whether those answers had been given voluntarily and out of his free will and also to decide what weight should be attached to those answers and whether they were true.

[16] The trial judge in paragraph 26 of the summing-up had again directed the assessors to consider whether the appellant had given the cautioned interview voluntarily and out of his free will and be satisfied of that fact beyond reasonable doubt and if not to disregard it.

> *'However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily and they were the truth, as judges of fact, you are entitled to reply on them for or against the accused. In other words, the weight and probative value of those statements are entirely a matter for you'*

[17] The trial judge had also given his mind to the voluntariness and truth of the appellant's cautioned statement in paragraph 3 of the judgment.

[18] Thus, in the absence of the appellant having challenged the voluntariness of the cautioned interview at the trial it was not any more a live issue at the trial though the trial judge out of abundance of caution had still directed the assessors to consider that aspect as well in addition to whether the appellant had made it, it was true and what weight should be attached to it. There was no reason for the trial judge to have changed his mind of his decision on voluntariness decided at the *voir dire* inquiry at the trial. Thus, the trial judge's impugned directions are not obnoxious to the legal position set down in **Singh v Stae** [2018] FJCA 206; AAU0114 of 2014, **Maya v State** [2015] FJSC 30; CAV009 of 2015 (23 October 2015) and **Lutumailagi v State** [2018] FJSC 18; CAV008 of 2018.

[19] This ground of appeal has no real prospect of success in appeal.

02nd ground of appeal

[20] The appellant argues that the trial judge had erred in declaring him as a habitual offender and used that fact as the basis not to make the sentences run concurrently but consecutively.

[21] The appellant contests the factual basis used by the trial judge in the sentencing order that the appellant had had 05 convictions of 'robbery with violence' on 27 February 2004 which led him to classify the appellant as a habitual offender pursuant to sections 10(c) and 11(1) of the Sentencing and Penalties Decree, 2009. His position is that he was convicted only of one offence of 'robbery with violence' but not five.

[22] However, it cannot be verified at this stage what material the learned trial judge possessed to conclude that the appellant had been convicted for five such offences on the same day *i.e.* 27 February 2004. The state also could not shed any light on that matter.

[23] Section 11 of the Sentencing and Penalties Decree states:

> *"(1) A judge may determine that an offender is a habitual offender for the purposes of this Part –*
>
> > *(a) When sentencing the offender for an offence or offences of the nature described in section 10;*
> > *(b) Having regard to the offender's previous convictions for offences of a like nature committed inside or outside Fiji; and*
> > *(c) If the court is satisfied that the offender constitutes a threat to the community.*
>
> *(2) The powers under this Part may be exercised by the court of Appeal and the Supreme Court when hearing an appeal against sentence. "*

[24] Section 10 of the Sentencing and Penalties Decree states:

> *"This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for –*
>
> > *(a) a sexual offence;*
> > *(b) offences involving violence;*
> > *(c) offences involving robbery or housebreaking;*
> > *(d) a serious drug offence; or*
> > *(e) an arson offence."*

[25] Also relevant is section 12 of the Sentencing and Penalties Decree which states:

"Where any court is proposing to impose a sentence of imprisonment on a person who has been determined to be a habitual offender under section 11 for an offence of a nature stated in section 10, the court, in determining the length of the sentence –

(a) shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

(b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence."

[26] Nevertheless, following the best traditions of the DPP, the state counsel conceded that even if the appellant had been handed over 05 convictions in 2004 that alone would not justify him being treated as a habitual offender because the trial judges hardly classify an accused as a habitual offender on the basis of a few convictions. He cited the case of **Suguturaga v State** [2014] FJCA 206; AAU0084.2010 (5 December 2014) as an authority that has dealt with a similar issue where the trial judge had classified the appellant as a habitual offender which was reversed by the Court of Appeal.

[27] In ***Suguturaga*** Gounder J. said on the process of declaring an accused as a habitual offender as follows:

'[14] In my judgment, there are two prerequisites for an exercise of discretion to declare an offender a habitual offender under section 11(1) of the Sentencing and Penalties Decree. The first prerequisite is that the offender is convicted of an offence of a nature that is prescribed under section 10. If the first prerequisite is met, then the second prerequisite is that the sentencing court having regard to the offender's previous convictions for offences of similar nature must be satisfied that the offender constitutes a threat to the community. If the sentencing court is so satisfied, then a sentence that is longer than that which is proportionate to the gravity of the offence can be imposed under section 12 for the purpose of protecting the community. Section 12 has clearly created an exception to the proportionality principle in sentence. The exception allows for the use of previous convictions as an aggravating factor to enhance the offender's sentence in order to protect the community. The constitutionality of section 12 is open for arguments. I express no opinion on that issue in this appeal.'

[28] It is clear from paragraph 4(iii) of the sentencing order that the learned trial judge had only considered the alleged 05 convictions of the appellant for 'robbery with violence' in classifying the appellant as a habitual offender. He had not given his mind to the requirements in section 11 of the Sentencing and Penalties Decree and the pronouncement in ***Suguturaga***. Although the requirements in sections 10(c), 11 (1)(a) and (b) may be satisfied in this case, most importantly, the trial judge had not satisfied himself that the appellant constituted a threat to the community as required in section 11(1)(c) which is a mandatory requirement. Therefore, the learned judge had erred in declaring the appellant to be a habitual offender.

[29] On the other hand, even assuming for the sake of argument that the trial judge had correctly treated the appellant as a habitual offender, still in terms of section 12(a) of the Sentencing and Penalties Decree the trial judge in imposing a sentence shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed and may (*i.e.* in his discretion) impose a sentence longer than that which is proportionate to the gravity of the offence.

[30] Whether section 12 of the Sentencing and Penalties Decree permits a trial judge to depart from 'one transaction rule' when it comes to sentencing habitual offenders is another issue because section 12 allows the judge to impose a longer sentence disproportionate to the offence. Can he do it by making sentences consecutive? Or should the judge not impose a longer sentence on each of the offences and make them run concurrently?

[31] ***Suguturaga*** goes onto describe 'one transaction rule' as follows.

> *[16] The appellant's contention under this ground is that the partially consecutive sentence that the learned High Court judge imposed breached the one transaction rule. The one transaction rule as it applies to sentencing was explained by the Supreme Court in* ***Wong Kam Hong v The State,*** *(unreported Criminal Appeal No. CAV0002 of 2003S; 23 October 2003) at p6:*
>
> > *"The "one-transaction rule" can be stated simply. Where two or more offences are committed in the course of a "single transaction", all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive. The underlying principle is that all the offences taken together constitute a single invasion of the same legally protected interests".*

[32] The learned trial judge has made the appellant's sentences for the two offences committed in the same transaction consecutive rather than concurrent thereby lengthening the total sentence to 08 years and 06 months which otherwise would have been concurrent and only 04 years and 03 months. Therefore, as formulated in paragraph 30 above this could be regarded as a question of law and no leave is required for the appellant to take it up before the full court.

[33] In the circumstances above discussed, the appellant seems to have a real prospect of success in appeal on the second ground of appeal as there is a sentencing error in terms of the guidelines **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal untimely preferred against sentence to be considered arguable there must be a real prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

03rd ground of appeal

[34] The complaint of the appellant is that the non-parole period of 08 years is too close to the head sentence of 08 years and 08 months, thus not affording the appellant the opportunity to rehabilitate.

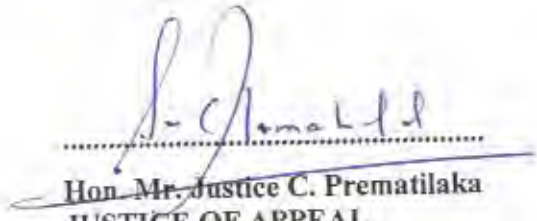
[35] I have addressed a similar complaint in detail in **Lata v State** [2020] FJCA 110; AAU0034.2018 (23 July 2020) and do not wish to repeat those observations once again.

[36] If the appellant's appeal against sentence on the second ground succeeds before the full court there would invariably be a variation of the sentence and the non-parole imposed on the appellant. Therefore, the third ground of appeal at this stage is superfluous and needs no specific ruling.

[37] The delays in the appellant's appeal against sentence and conviction are substantial and cannot be excused. His explanation for the delay is unconvincing. However, since he has a real prospect of success on the second ground of appeal against sentence enlargement of time to appeal against sentence has to be granted. There would not be prejudice to the respondent by the extension of time.

Order

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL