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

CRIMINAL APPEAL NO.AAU 035 of 2019
[In the High Court at Suva Case No. HAC 430 of 2016S]

BETWEEN	**:**	**MOAPE ROKORAICEBE**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Appellant in person**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	**:**	**31 March 2021**
Date of Ruling	**:**	**06 April 2021**

RULING

[1] The appellant (02nd accused in the High Court) had been indicted with another (01st accused in the High Court and the appellant in AAU 0037 of 2019) in the High Court of Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009, one count of abduction contrary to section 282 (a) Crimes Act of 2009 and one count of damaging property contrary to section 369 (1) Crimes Act of 2009 committed on 24 November 2016, at Kasavu, Nausori in the Central Division. The information read as follows:

'COUNT 1'

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311 (1) (a) of the Crimes Act of 2009.*

Particulars of Offence

ASESELA NAUREURE AND MOAPE ROKORAICEBE*, on the 24th day of November 2016, at Kasavu, Nausori in the Central Division, robbed ANIL KUMAR of his taxi registration Number LT 7127 valued at $25,000, cash $160.00 and a black Forme mobile phone valued at $50.00 all to the total value of $25,210 and immediately before the robbery used violence on the said ANIL KUMAR.*

'COUNT 2'

Statement of Offence

ABDUCTION: *Contrary to section 282 (a) Crimes Act of 2009.*

Particulars of Offence

ASESELA NAUREURE AND MOAPE ROKORAICEBE*, on the 24th day of November 2016, at Kasavu, Nausori in the Central Division, abducted ANIL KUMAR in order that he may be subjected to grievous harm.*

'COUNT 3'

Statement of Offence

DAMAGING PROPERTY: *Contrary to section 369 (1) Crimes Act of 2009.*

Particulars of Offence

ASESELA NAUREURE AND MOAPE ROKORAICEBE*, on the 24th day of November 2016, at Wairuku, Rakiraki in the Western Division, wilfully and unlawfully damaged the black Fielder Taxi registration number LT 7127 valued at $25,000.00 the property of ANIL KUMAR.*

[2] On 13 March 2019, following the summing-up, the assessors had expressed a unanimous opinion of guilty against the appellant in respect of all counts. The learned High Court judge in his judgment delivered on the same day had agreed with the assessors and convicted the appellant of all counts. He had been sentenced on 14 March 2019 to 12 years, 05 years and 18 months of imprisonment for the three charges respectively, all to run concurrently with a non-parole period of 10 years.

[3] The appellant being dissatisfied with the conviction and sentence had in person signed a timely application for leave to appeal against conviction and sentence on 09 April 2019. He had preferred additional grounds of appeal against conviction later. Finally

he relied on amended grounds of appeal and submission that had been received by the CA registry on 14 July 2020 and written submission received by the CA registry on 12 October 2020. The respondent's written submissions had been tendered on 11 November 2020. The appellant had tendered an affidavit on 18 Januarys 2021 and handed over a written submission at the hearing 31 March 2021 which in substance is the same as his previous submission.

[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 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.

[5] 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.*

[6] Grounds of appeal urged by the appellant against conviction and sentence are as follows:

Conviction

Ground 1

That the Learned Trial Judge erred in law and in fact when he failed to properly consider and analyse the facts and relevant consideration of section (14) (2) (h) (i) of the Constitution of the Appellant to be tried in Absentia, depriving the right enshrined under section (15) (1) of the Constitution.

Ground 2

That the Learned Trial Judge erred in law and fact when he failed to consider the provision provided under section 171 (i)(a) of the criminal procedure Act 2009 considering the fact that the Appellant was charge with the indictable offence trial able by the High Court failure to consider the same has caused a substantial miscarriage of justice.

Ground 3

That the Learned Trial Judge erred in law and in fact when he took the uncorroborated circumstantial evidence to convict the assessors on how to approach the concept of circumstantial evidence, which the learned prosecution entirely relies in the trial of this matter against the two accused persons.

Ground 4

That the Learned Trial Judge erred in law and fact when he failed to consider that the complainant did not give any description of the Appellant and did not identify in the dock neither there wasn't any identification parade conducted, failure to ascertain the identification of the appellant has caused the trial to miscarry and rendered the conviction as unsafe.

Ground 5

That the Learned Trial Judge erred in law and in fact when he failed to consider that the elements of section 46 of the Crimes Act which stated the elements of Joint Enterprise, whereby there was no material evidence to prove that the appellant was part of the Act and had any intention pertaining to the offence. Failure to consider the same has rendered the conviction unsafe and a grave miscarriage of justice has occurred.

Ground 6

That the Learned Trial Judge erred in law and in fact when he failed to exercise the provisions of section 171(2) of the criminal procedure Act 2009 requires the presence of the Accused.

Ground 7

Incompetent Legal Representative.

Sentence

Ground 1

That the sentence of 12 years with a non-parole period of 10 years is harsh and excessive considering all the circumstances.

Ground 2

That the Learned Trial Judge erred in law and in fact when he enforces a non-parole period close to the head sentence.

[7] The evidence of the case had been summarised by the learned trial judge as follows in the sentencing order:

> *2.'The brief facts of the case were as follows. On 24 November 2016, the complainant, Mr. Anil Kumar (PW1) was aged 59 years old. He was married with three children in their twenties. He earns his living by driving a taxi, registration number LT 7127. He also owned the taxi. While working early morning on 24 November 2016 (Thursday), he picked up Mr. Asesela Naureure (Accused No. 1) at Gordon Street Suva at about 6.30 am. Accused No. 1 asked him to go to Fiji National University (FNU) Tamavua to pick up Mr. Moape Rokoraicebe (Accused No. 2). Mr. Kumar complied, and drove to FNU Tamavua.*
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> *3. At FNU Tamavua, Mr. Kumar picked up Moape Rokoraicebe (Accused No. 2). Both accuseds sat in the backseat and requested to be taken to Kasavu Nausori. Mr. Kumar took the two to Kasavu Nausori. At Kasavu, Moape asked Mr. Kumar to take them to Tailevu. Mr. Kumar passed two villages and was asked to stop at a breadfruit tree thereafter. Moape then pulled Mr. Kumar out of the taxi and took the car key. Asesela then tried to attack Mr. Kumar with a screw driver. Mr. Kumar defended himself, and Asesela repeatedly punched him in the mouth, whereby he lost some teeth. Later, the two accuseds abducted Mr. Kumar to Korovou Town.*
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> *4. At Korovou Town, Asesela then took over from Moape, in driving the taxi. Moape drove the same from Tailevu. Asesela drove to Rakiraki. They had an accident at Wairuku Rakiraki, where the taxi was severely damaged. The two accuseds fled the crime scene. Mr. Kumar, who was knocked unconscious, was later taken to Rakiraki Hospital. The matter was reported to police. An investigation was carried out. The two accuseds were later charged for aggravated robbery, abduction and damaging property. They had been tried and convicted of the above offences in the High Court.*

01st, 02nd and 06th ground of appeal

[8] These ground of appeal could be considered together. The appellant argues that his rights under section 14(2)(h)(i) of the Constitution had been violated as a result of the trail against him *in absentia* on the premise that he was not aware of the trial date as he was held in remand custody from 10 February 2018 to 29 March 2018. The pre-trial conference had taken place on 02 March 2018 and trial proper from 07 to 12 March 2019. Summing-up and judgment had been delivered on 13 March 2019 and the appellant had been sentenced in his absence on 14 March 2019.

[9] The appellant had attended court last time on 26 October 2017 and thereafter he had not appeared in court but continued to be have been represented by legal aid lawyers (see paragraph 8 of the summing-up). The trial judge had referred to the pre-trial conference on 02 March 2018 at paragraph 09 of the summing-up and stated that the counsel for the appellant had advised the court that the latter had told the counsel by phone that he was aware of the case but preferred not to come to court. The judge had further gone on to state that a bench warrant had been issued against the appellant and it was still pending unexecuted as of that date. On 23 March 2018 the prosecution had applied that the appellant be tried *in absentia* in terms of Article 14 (2((h)(i) of the Constitution and it had been allowed by court. That sums up the reason for holding the trial *in absentia*.

[10] The appellant before this court vehemently denied having spoken to his counsel for the Legal Aid Commission or instructed her that he was not keen to attend court. His position is that he was in remand custody from 10 February 2018 until he was released on bail by the end of March 2018 in connection with Suva Magistrates court case No. C/F 205/18. A letter issued by the Superintendent of Corrections Mr. L. Rokovesa (Assistant Commissioner of Operations) dated 08 February 2021 confirms that the appellant was in Suva remand centre from 10 February 2018 to 29 March 2018.

[11] What cannot be verified at this stage is on what day the appellant had supposedly given instructions to his Legal Aid counsel that he was not interested in attending court in respect of the High Court trial. If he had informed his counsel his preference

not to appear in the High Court for the trial prior to 10 February 2018 then having been in remand custody after that date would not have made a difference, for even if he had been free to attend court he would not have appeared in court. There is also no explanation on his part as to why he had failed to come to court after 26 October 2017 that made the High Court issue a bench warrant. However, he denies having ever instructed his counsel his preference not to appear for the trial. The trial counsel's position regarding the appellant's allegation is not before this court either. Further, had the counsel for the appellant in fact received such a communication from him after 26 October 2017 it is unlikely that she would not have disclosed the fact that he was in remand custody also to the High Court. The complete record of proceedings might shed some more light on this matter but in the absence of them nothing further could be ascertained.

[12] Section 14(2)(h)(i) is as follows:

> *'Every person charged with an offence has the right to be present when being tried, unless (i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or (ii).....'*

[13] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions that should be satisfied before an accused can be tried in his absence. Those conditions are that (i) the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.

[14] The first of these conditions is an obligation on the part of the court envisaging sufficient notice on the accused that he should appear at the trial or a direction on the authority holding him to produce the accused in court for the trail while the second condition is a conscious, deliberate or voluntary decision on the part of an accused not

to present himself for the trial. However, once such notice has been given to an accused, if not detained under the authority of court, it is his responsibility to make himself available to face trial on every occasion without any further notice unless prevented from doing so for reasons beyond his control. Therefore, section 14(2)(h)(i) of the Constitution is no license for an accused to evade process of court and course of justice.

[15] The common law sheds more light on this issue. It appears that even when an accused waives his right to be present the court is not necessarily bound by law to proceed with the trial without the accused. Discretion is vested in the trial judge to decide whether the accused should be tried in his absence or not. In **R v Abrahams** 21 VLR 343 where the appellants were present at the commencement of the trial but were absent at a later stage due to illness, Williams J said, at p 346:

> *'The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence.'*

[16] **Regina v Jones** (On Appeal From The Court of Appeal (Criminal Division) [2002] UKHL 5 Lord Hutton said:

> *'23. I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.*
>
> *24. The authorities also show that there are two stages in the approach to be taken to the matter. The first stage is that although the defendant has a right to be present at his trial and to put forward his defence, he may waive that right. The second stage is that where the right is waived by the defendant the judge must then exercise his discretion as to whether the trial should proceed in the absence of the defendant.'*

[17] In **R v O'Hare** [2006] EWCA Crim 471, [2006] Crim LR 950 the accused had absconded even before a date had been set for his trial and made no effort to contact

the court either directly or through counsel, and the court concluded that the accused had waived his right to be present at the trial.

[18] The Trial judge had every right to proceed to try the appellant *in absentia* on the unequivocal advice given by the appellant's counsel that he preferred not to attend court. There is no violation of the appellant's rights under section 14(2)(h)(i) of the Constitution. However, the appellant strongly denies ever having communicated such instructions to his counsel. He further submits that he was not in a position to call his counsel over the phone as he was in remand custody. However, it is well known that inmates are provided with such facilities of communication to get in touch with their family members, registries of courts and lawyers. His absence from court had denied any opportunity for the complainant to make any dock identification, if that was possible.

[19] Therefore, in the absence of trial proceedings, I am not in a position to affirmatively conclude that the appellant had in fact communicated or not with his counsel after 10 February 2018 over the phone and informed her that he preferred not to attend court. However, I am inclined to grant leave to appeal so that the full court could probe the appellant's complaint further to see whether there had been any violation of the appellant's rights under section 14(2)(h)(i) of the Constitution. If the appellant's position is to be accepted by the full court he has a reasonable prospect of success on this ground of appeal.

03rd ground of appeal

[20] The trial judge had stated at paragraph 42 that he prosecution relied on circumstantial evidence to connect the appellant with the crimes. The evidence of the complainant suggests that he was in a position to identify the appellant during the journey from FNU Tamavua to Rakiraki which had taken at least an hour. However, there was no police identification parade or dock identification. The circumstantial evidence against the appellant appears to be the evidence of the appellant being arrested while trying to flee into a sugar cane field within a few hours of the incident in the general area of the crime scene. Further, the appellant had given a false name to the police upon arrest *i.e.* Amena Seru which was exposed *via* PW5 who had known him from

childhood. This is evidence of subsequent conduct influenced by the fact in issue. PW2 had confirmed that the appellant was working with him as a security guard and after 6.00 a.m. a black Fielder taxi driven by an Indo-Fijian man had arrived and stopped on the road. Someone from the taxi called out the appellant and he had asked permission from PW2 to knock off early from work, who had then left in the same taxi. The complainant had earlier stated that the co-accused had asked him to drive to FNU Tamavua to pick up another person working as a security officer.

[21] The appellant complains that the trial judge had used his name at paragraph 45 in describing the complainant's (PW1) evidence as if PW1 had identified them by their names when PW1 had said that the offenders were previously unknown to him, which had caused him prejudice. It would have been desirable for the trial judge not to have attributed the roles played by each of the offenders by their names as it was a matter for the assessors to decide on evidence. However, in the light of the circumstantial evidence the assessors had decided that the appellant was guilty of the crimes along with his co-accused. The complainant had been prevented from possible identification of the appellant in the dock as a result of his absence from court. Thus, he cannot get the benefit of the absence of such identification caused by his own action (if his counsel was to be believed).

[22] Therefore, I am not inclined to hold that there is a reasonable prospect of success of this ground of appeal.

04th ground of appeal

[23] There is nothing to indicate in the summing-up or the judgment that the complainant had not given a description of the appellant to the police. There was no way that he could identify the appellant in the dock as the appellant was not in court and tried *in absentia*.

[24] Therefore, there is no reasonable prospect of success of this ground of appeal.

05th ground of appeal

[25] Contrary to the appellant's argument the trial judge had in fact addressed the assessors on joint enterprise at paragraph 21 of the summing-up and at paragraph 9 of the

judgment. The evidence of PW1 clearly shows that the two offenders were acting in pursuance of a joint enterprise.

[26] Therefore, there is no reasonable prospect of success of this ground of appeal.

07th ground of appeal

[27] The appellant criticizes the trial counsel for her appearance for him and the manner in which she had conducted his case at the trial.

[28] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant. The appellant had not followed those guidelines.

[29] Therefore, there is no reasonable prospect of success of this ground of appeal at all.

01st ground of appeal against sentence.

[30] This ground of appeal represents the main argument on the sentence.

[31] The learned High Court judge had applied the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment. He had picked 12 years as the starting point and enhanced the sentence on account of two aggravating features by 02 years and deducted 01 year for remand the period arriving at the sentence of 13 years with a non-parole period of 10 years.

[32] The tariff in ***Wise*** was set in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. The factual background in ***Wise*** was as follows:

> '*[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.*
>
> *[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had*

entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'

[33] The facts highlighted by the trial judge show that what had happened was in the category of an *'Attack against taxi drivers'* where the sentencing tariff is between 04 to 10 years. It is less serious than *'home invasion in the night'* as espoused in ***Wise*** (08 to 16 years). Nevertheless, given the overall background, objectively the offence of aggravated robbery the appellant had been convicted of assumes a high degree of seriousness.

Attacks against taxi drivers

[34] In **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment:

'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.

*[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*

*[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*

*[13] In **State v Kotobalavu** & Ors Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manoa** HAC 061.2010, said at p6:*

> *"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."*

[14] Similar pronouncement was made in ***Vilikesa*** *(supra) by Gates J (as he then was):*

> *"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[35] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Raqici*** and Gounder J. stated:

> *'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea…'*

[36] It was held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'[17] it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'*

[37] The Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) said:

> *'[19]……. When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; ……..'*

[38] Therefore, picking 12 years as the starting point by the trial judge based on ***Wise*** may demonstrate a sentencing error. However, the objective seriousness of this particular aggravated robbery could have justified a higher starting point of the sentencing tariff between 04 years to 10 years for *'Attack against taxi drivers'*. If the starting point was

taken at the lower end the aggravating features would have justified a very substantial increase of the sentence.

[39] The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies demand deterrent custodial sentences. Thus, deterrence should be treated as one of the main consideration in deciding the length of the sentence imposed to safeguard the public and the providers of public services from prospective offenders. However, the sentence of 12 is still outside the sentencing tariff for *'Attack against taxi drivers'*.

[40] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. On the other hand, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[41] Therefore, in all the circumstances of this case, I think that the appellant's appeal against sentence should be allowed to go before the full court for it to decide the ultimate sentence in terms of section 23(3) of the Court of Appeal Act.

[42] Accordingly, leave to appeal against sentence is allowed on this ground of appeal.

02nd grounds of appeal against sentence

[43] The appellant argues that the trial judge had made the non-parole period too close to the head sentence. The gap between the two is 02 years.

[44] In terms of section 18 of the Sentencing and Penalties Act the trial judge was empowered to fix a non-parole period.

[45] 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'.*

[46] This ground of appeal is vexatious and dismissed in terms of section 35(2) of the Court of Appeal Act.

Orders

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL