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

CRIMINAL APPEAL NO.AAU 32 of 2020
[In the High Court at Suva Case No. HAC 309 of 2018]

BETWEEN	:	**SAMUELA ROGOKACI BOKADI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**26 October 2022**
Date of Ruling	:	**27 October 2022**

RULING

[1] After trial, the appellant had been convicted in the High Court at Suva on six counts of attempted act with intent to cause grievous harm contrary to section 44 and 255(b) of the Crimes Act 2009 and four counts of resisting arrest contrary to section 277(b) of the Crimes Act 2009. Before the commencement of trial, he had pleaded guilty to a single charge of damaging property (count three) contrary to section 369(1) of the Crimes Act 2009.

[2] The learned trial judge had set out the facts of the case as follows in the sentencing order.

> *'[2] The offender was in a living relationship with the victim on count one. The couple lived in a separate dwelling with his parents living next to them. In the morning of 24 July 2018 the couple had an argument over him being away from home in the weekend. The offender's father, Mr Bokadi Snr out of concern for the*

safety of the victim told her to take refuge at the Delainavesi Community Police Post next to their home. The Police Post is located at the Delainavesi Junction near the Queens Highway. On that morning the Police Post was being managed by WSC Tulia Tuikenawa, the victim on count two.

*[**3**] Shortly after the victim arrived at the Police Post, Mr Bokadi Snr followed her as he was concerned about her safety. While Mr Bokadi Snr was having a conversation with WSC Tuikenawa, the offender came down to the Police Post with two cane knives. He tried to enter the Police Post but Mr Bokadi Snr stopped him.*

*[**4**] WSC Tuikenawa warned the offender not to enter the Police Post but the offender became aggressive and threatened her. She called for a backup but her call was not answered. She then tried to reach out to the public on the highway for help when the offender struck her legs with the cane knife. The police officer managed to dodge the knife and run to safety. By that time three more police officers, the victims on counts four to nine arrived at the scene after seeing the commotion from the highway. When the officers told the offender to put down his weapon and surrender he ran after them with the knives, hurling threats to kill. The police officers had to retract to avoid being harmed by the offender.*

*[**5**] The offender made several attempts to gain entry into the Police Post knowing his partner was hiding inside, but Mr Bokadi Snr obstructed him. In rage the offender struck the Police Post several times causing extensive damage to the building. The total value of the damage done to the property of Fiji Police Force was $587.56.*

*[**6**] Eventually a backup police team arrived and the offender turned to them as well. He struck a police officer, the victim on counts ten and eleven with the cane knife but the officer dodged and fell off the tray of the vehicle.*

*[**7**] The police officers then armed themselves with rocks and approached the offender. It was only then the offender dropped his knives and surrendered. He was arrested and escorted to the Lami Police Station.'*

[3] After trial, the assessors had expressed a unanimous opinion that the appellant was guilty of all counts. The learned High Court judge had agreed with their opinion and convicted the appellant as charged. The appellant had been sentenced on 15 May 2020 to an aggregate term of 4 years' imprisonment for the offences of attempted act with intent to cause grievous harm as convicted on counts one, two, four, six, eight and an aggregate term of 02 years' imprisonment for the offences of resisting arrest as convicted on counts five, seven, nine and eleven, 01 year imprisonment for the offence of damaging property as convicted on count three. The trail judge ordered the sentence of 01 year imprisonment for damaging a public property to be served

consecutively with the aggregate terms imposed for attempted act with intent to cause grievous harm and resisting arrest thus making the total effective term to 05 years' imprisonment with a non-parole period of 03 years. This also meant that the trial judge had wanted the sentences for the offences of attempted act with intent to cause grievous harm and for the offences of resisting arrest to run concurrently.

[4] The appellants' appeal only against sentence is out of time by 04 days and the delay could be excused.

[5] The appellant's grounds of appeal are as follows.

> *(a) THAT the sentencing Judge overlooked the Totality Principle when sentencing the appellant, particularly, when those offences had the same origin and was the result of the same transaction.*
>
> *(b) THAT the consecutive sentence was wrong in principle given the fact that the offences were all cognate in nature.*
>
> *(c) THAT the sentencing Court is obliged by law to deduct the 22 months served in custody, given the total term he will now be incarcerated in prison.*
>
> *(d) THAT the appellant was a 01st offender at the time of the offending and that should have been considered by the Sentencing Court in arriving in its final sentence.*

01st and 02nd ground of appeal

[6] The reason given by the trial judge for making the sentence of 01 year imprisonment for damaging a public property to be served consecutively with the aggregate terms imposed for attempted act with intent to cause grievous harm and resisting arrest is as follows.

> *'[17] Making all the terms of imprisonment cumulative will result in a crushing sentence. However, I consider the offence of damaging property as a separate offence from attempted act with intent to cause grievous harm and resisting arrest to justify an additional punishment to reflect the total criminality involved…..'*

[7] The trial judge had obviously acted under section 22 (1) of the Sentencing and Penalties Act in ordering consecutive sentences. There is no doubt that the trial judge had the discretion to do as indicated by the words *'unless otherwise directed by the court'* in section 22 [see **Vaquwa v State** [2016] FJSC 12; CAV0016 of 2015 (22 April 2016)] and **Tuibua v State** [2008] FJCA 77; AAU0116 of 2007S (07 November 2008) and **Levula v State** [2021] FJCA 159; AAU0044.2019 (15 October 2021) for the totality principle and observations thereon by the Court of Appeal]

[8] A court must when the "default" position is concurrency make a reasoned justification to depart from the "default" position in making sentences consecutive [vide **Vukitoga v State** [2013] FJCA 19; AAU0049.2008 (13 March 2013)]. The issue is whether the trial judge's decision to treat the offence of damaging property as a separate offence to reflect on the *'total criminality'* involved as a justification for the consecutive sentence was a reasoned justification to depart from the "default" position of concurrency under section 22 (1) of the Sentencing and Penalties Act.

[9] The other applicable sentencing principle here is totality of sentencing. Totality principle requires a sentence who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interest of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct [vide **Rawaqa v State** [2009] FJCA 7; AAU009.2008 (8 April 2009)].

[10] Therefore, the next issue is assuming that there is no reasoned justification to depart from the "default" position of concurrency, whether the concurrent sentences could still be justified on totality principle in the interest of justice.

[11] I think that these are matters the court may look into and determine at a full court hearing.

03rd ground of appeal

[12] The appellant complains that the trial judge had not reduced his remand period of 22 months from the final sentence. The trial judge had said of this as follows.

> *'[15] The offender had been in custody on remand for nearly 22 months. This period is considered as a downward adjustment to the final sentence.*

[13] It appears from paragraphs 12-15 of the sentencing order that the trial judge had adopted the instinctive synthesis method of sentencing. The term originates from the Full Court of the Supreme Court of Victoria decision of **R v Williscroft** [1975] VR 292 where Adam and Crockett JJ stated:

> *'Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process'.*

[14] In **Wong v R** [2001] HCA 64; 207 CLR 584; 185 ALR 233; 76 ALJR 79 (15 November 2001) it was held about expression '*instinctive synthesis'*

> *'This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.'*

[15] In **Markarian v The Queen** [2005] HCA 25 McHugh J described instinctive synthesis approach at [51] as:

> *'…the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.*
>
> *The alternative approach to this method is the two-step approach. This approach involves a sentencing judge setting an appropriate sentence commensurate with the objective severity of the offence and only then making allowances up and down, in light of relevant aggravating and mitigating in the circumstances.'*

[16] The two-step approach was rejected in **Markarian v The Queen** (supra),[28] where it was noted:

> *'Following the decision of this Court in Wong it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison'.[29]'*

[17] In **Barbaro v The Queen** [2014] HCA 2 the High Court affirmed that sentencing is not a mathematical exercise, stated at [34]:

> *"Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentencing cannot, and should not, be broken down into some set of component parts. As the plurality said in Wong v The Queen, "[s]o long as a sentencing judge must, or may, take account of all of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform"*
>
> *The process of instinctive synthesis is a mechanism whereby sentencers make a decision regarding all of the considerations that are relevant to sentencing, and then give due weight to each of them, and then set a precise penalty.*
>
> *Accordingly there is no single correct sentence, and that the 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'.*

[18] I have little doubt that the trial judge had taken into account the appellant's remand period in his instinctive synthesis approach to arriving at the sentence.

[19] However, section 24 of the Sentencing and Penalties Act requires the sentencing court to regard the time in custody before trial as a period of imprisonment, unless ordered otherwise, in sentencing an offender to a term of imprisonment. The Supreme Court in **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016) held that section 24 of the Sentencing and Penalties Act is mandatory in that the court **shall** regard any period of time during which the offender has been held in custody prior to the trial as a period of imprisonment already served by the offender, 'unless a **court** otherwise orders'. The methodology of deducting the time spent on remand at the end after arriving at the appropriate sentence following the usual sentencing procedure and then

specifying the head sentence and non-parole period was recommended as the preferred or proper way to give effect to section 24. **Tasova v The State** Criminal Petition CAV 0012 of 2019 (25 August 2022) has affirmed ***Sowane.*** In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) it was reiterated that the Supreme Court favoured the approach of granting the discount for the remand time to be dealt with last (*i.e.* once the term and non-parole period is arrived at the court will set out a suitable discount for the period of remand) but it did not rule out or consider any other method to be an error of law.

[20] Though I do not see a breach of section 24 of the Sentencing and Penalties Act by instinctive synthesis approach to sentencing where the remand period is not seen to be specifically deducted at the end, I think it is better for the full court to make an authoritative pronouncement on this aspect as well.

[21] Appellate courts have held in the past that the method or methodology used to discount the appellant's remand period involves no error of law or principle, for sentencing is not a mathematical exercise but an exercise of discretion involving the difficult and inexact task of weighing factors to arrive at a sentence that fits the crime (see **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017).

[22] Nevertheless, 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).

[23] Therefore, it is for the full court to decide whether the final sentence is justified irrespective of the answers given to the issues highlighted above.

04th ground of appeal

[24] Contrary to the appellant's assertion, the trial judge had in deed taken into account the fact that he was a first time offender at paragraph 12 of the sentencing order in arriving at the sentence.

Order

1. Leave to appeal against sentence allowed on 01st to 03rd grounds of appeal.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL