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

CRIMINAL APPEAL NO. AAU 085 OF 2024
[Lautoka High Court: HAC 195 of 2016]

BETWEEN : **ASELAI WAQANIVALU**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Mr. M. Fesaitu for the Appellant
Mr. S. Seruvatu for the Respondent

Date of Hearing : 28 August, 2025
Date of Ruling : 22 October, 2025

RULING

(A). Background

[1] The Appellant was convicted with four others after a High Court trial for two counts of aggravated robbery. As a consequence of being convicted the Appellant was sentenced on 23rd of July 2024 to an aggregated term of 7 years imprisonment with a non-parole period of 6 years imprisonment.

[2] The Appellant is appealing his sentence on the following amended grounds of appeal:

Ground 1

The learned trial judge had erred in principle by fixing a non-parole period too close to the head sentence, denying or discouraging the Appellant the possibility of rehabilitation.

Ground 2

The learned judge erred in principle as a result of double counting by taking into account an aggravating factor that the Appellant had punched the first complainant which is already reflected in the level of culpability as to the nature of offending, therefore the trial judge was in error to have enhanced the Appellant's sentence by an additional 6 months added to the aggravating factors.

(B). Facts

[3] The learned Judge in the sentencing decision at paragraphs [3] and [4] had summarized the facts emerging from the trial as follows:

> *"The facts were that the complainant and his wife were running a business at the Lautoka Market. On the day of the incident, the complainant took his wife and the two kids, a son aged 10 and a daughter aged 01, left for Kashmir in his Toyota Prado to pick up his sister, who had come from New Zealand. There were two bags containing clothes, a gold chain, $16,000+ money and two smartphones in the vehicle. His wallet was in his pocket. The money collected from his business was to be deposited in the bank the next morning.*
>
> *On their way, the complainant stopped his vehicle in front of a shop in Kashmir at around 7.20p.m. While the engine was on, he went inside the shop to buy some stuff for the kids. His wife sat in the front passenger seat with his daughter and the son in the back seat. Suddenly, he heard his wife scream. When he turned back, he saw an Itaukei guy sitting in the driving seat of his vehicle. He ran to the vehicle and forced himself inside it to get the Itaukei guy out. There were eight Itaukei men, and the others loomed soon. The 1st Offender and another started to assault the complainant in*

full view of the public. One of them picked up his wallet. The 2nd Accused kicked an old onlooker Indian man. The complainant's wife managed to get out of the vehicle with their daughter. One robber dropped the son on the pavement. All the robbers got in the vehicle and fled the scene. The whole incident was captured by the CCTV camera installed at the shop. The CCTV footage displayed a Chicago-type systematic and coordinated brutal attack on the victims and their property rights."

(C). The Law

[4] The test for leave to appeal is *"reasonable prospect of success"*: see **Caucau v State** AAU 0029 of 2016;4th October 2018 [2018] FJCA 171; **Navuki v State** AAU0038 of 2016;4th October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017;(4th October 2018[2018] FJCA 173,**Sadrugu v The State** Criminal Appeal No.AAU0057 of 2015;06 June 2019 FJCA 87 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] The appellate courts in considering appeals against sentence are guided by the principles in **Kim Nam Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) and will not interfere with a sentence unless the Learned Judge had made one of the following errors:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts, or

(iv) Failed to take into account some relevant consideration.

(D). High Court (Sentence delivered on 23rd July 2024 per Aruna Aluthge, Judge)

[6] In paragraph 8 in relation to property-related offences such as Aggravated Robbery and Burglary, the Court stated that they are on the rise and the increasing prevalence

of these offences in our community calls for deterrent punishment. The maximum sentence for Aggravated Robbery is 20 years' imprisonment. It is now settled that offenders of Aggravated Robbery must be sentenced in accordance with the sentencing guidelines and the tariff set out by the Supreme Court in **Eparama Tawake v State** CAV 0025.2019 (28th April 2022).

[7] According to above paragraphs 25 and 26 of the guidelines **(Tawake),**

> *25. There is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence, and if the offence is one of aggravated robbery, which of the forms of aggravated robbery the offence took. When it comes to the level of harm suffered by the victim, there should be different levels. The harm should be characterized as high in those cases where serious physical or psychological harm (or both) has been suffered by the victim. The harm should be characterized as low in those cases where no or only minimal psychological harm was suffered by the victim. The harm should be characterized as medium in those cases in which, in the judge's opinion, the harm falls between high and low.*
>
> *26 .Once the level of harm suffered by the victims has been identified, the Court should use the corresponding starting point from the table set out in the judgment to reach a sentence within the sentencing range.*

[8] The learned judge commented on the previous guideline set by the Supreme Court in **Wise v State** [2015] FJSC 7CAV0004.2015 (24 April 2015), and in paragraphs 14, 15, 16, 17 and 18 stated:

> *"14. The culpability levels of all offenders are almost on equal footing. This robbery was committed in the company of each other. Although no weapon was used, the level of violence was high. The complainant received minor injuries because of the assault, albeit they were not that serious. The harm should be characterized as high in this case as the psychological harm suffered by the victims, especially the children, was high.*

15. A starting point of 7 years and a sentencing range of 5-9 years' imprisonment is reserved by the said Tawake guidelines for the aggravated gang robberies committed of this magnitude. I start the sentencing process of each offender with a starting point of 7 years' imprisonment from the bottom end of the tariff.

Aggravating Factors

16. Being guided by Tawake, I identified the following common aggravating factors for all offenders. There was evidence of pre-planning. Four offenders had come to the West all the way from Suva to commit this organized crime. It was a high-handed frightening night-time invasion of the person committed in full view of the public without any regard for the law. One of the victims received minor injuries and all the victims no doubt were subjected to psychological trauma. The robbery was committed with the knowledge of the presence of two vulnerable children, in whose view their father was assaulted, and their vehicle robbed. The value of the property stolen was high. Except for the vehicle, the valuables stolen were never recovered. For these aggravating features, the sentence should be increased by three years to arrive at an aggregate interim sentence of 10 years imprisonment.

17. In addition to these aggravated factors which should apply equally to all offenders, the offending of the 1st and 2nd Offenders were further aggravated because of their distinct actions. The 1st Offender pulled the complainant and assaulted him repeatedly. The 2nd Accused kicked an on-looker old Indian man who was just witnessing the robbery. Accordingly, I add 6 months to the sentence of the 1st Offender to arrive at an interim sentence of 10 years and 6 months imprisonment. I add 3 months to the sentence of 2nd Accused to arrive at a sentence of 10 years 3 months imprisonment.

Mitigating Factors

18. Before examining the mitigating factor for each offender, I would like to identify the common mitigating factors applicable to all. The offence

was committed eight years ago on 22 September 2016.All the offenders were arrested soon after that and brought before the Court. The trial commenced in April 2024 and the conviction was recorded on 24 May 2024. <u>There is a delay prosecuting this matter of approximately eight years</u>. Although the offenders also contributed to the delay, <u>it is reasonable to give some allowance to the delay in mitigation</u>. The stolen motor vehicle was recovered, but not because of their cooperation with the police. Therefore, the offenders do not deserve a considerable discount for the recovered stolen property although the recovery of the vehicle mitigated the loss caused to the victim.''

(E). Appellant's Case

[9] The appellant is seeking leave for Enlargement of Time to appeal against sentence based on two grounds.

[10] **Ground 1**- The primary complaint is not the length of the sentence but the closeness of the non-parole period to the head sentence which sees the Appellant being discouraged from rehabilitation: **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023) on the issue of non-parole periods too close to the head sentence. That the learned judge had erred in exercising his sentencing discretion by fixing a non-parole period too close to the head sentence, discouraging or denying the Appellant the possibility of rehabilitation. It is submitted that despite the fact that the Appellant is not a person of previous good character, the closeness in the non-parole period fixed would deny any prospect of rehabilitation given the Appellant's personal circumstances of being 36-year-old father married with a child and his wife expecting another child at the time of sentencing.

[11] **Ground 2**- The Appellant submits that the learned trial judge was correct in identifying the guideline set out in **State v Tawake** (supra) as applicable to the facts arising from this case, however, the learned trial judge had fallen into error of double counting. The Court double counted by using the level of culpability in terms of him punching the first complainant when the robbery was committed, but this time as aggravating factor. Apart from giving three years for the aggravating factors identified, 6 months is further added for the Appellant having assaulted the 1st

complainant. The Appellant punching the first complainant is already subsumed in the level of culpability in light of the nature of the offending. The approach taken to enhance the sentence has unfairly put the Appellant at a receiving end with 6 months added to the 3 years for aggravating factors enhancing the starting point from 7 years to 10 years and 6 months.

(F). Respondent's Case

[12] The Respondent submits that this application for leave to appeal is out of time by 82 days. A delay of up to 3 months may be excused as a matter of practice: **Seresere v State** [2008] FJCA 71, however, longer delays require stronger justification The court prioritizes timely appeals to avoid clogging its roll and disadvantaging timely appellants.

[13] The Respondent relies on principles that Court is to consider when exercising its discretion in Enlargement of time applications, cases include **Rasaku v State** [2013] FJSC 4; (CAV 0013 of 2009) at paragraphs 18 and 19 of guideline statement.

[14] The Respondent submits that the case **Nasila v State** [2019] FJCA 84 this Court had set a higher threshold for enlargement of time applications compared to ordinary leave appeal. While leave to appeal require the test of *"reasonable prospect of success",* enlargement of time requires *"real prospect of success"* meaning the appeal must not only be arguable but likely to succeed. The elevated standard ensures that only meritorious appeals proceed given the exceptional nature of time extensions.

[15] **Ground 1**- The Respondent discusses the purpose of section 18 of the Sentencing and penalties Act and the case **Natini v State** [2015] FJCA 154 on the discretion to fix a non-parole period, a task which rests squarely with the sentencing judge. That the Court of appeal affirmed that the trial judge, being best positioned to assess the *specific circumstances of the case,* is entitled to determine an appropriate non-parole period. In this case, the learned trial judge meticulously evaluated the *aggravating features* of the offence, particularly noting the *"Chicago-type systematic and coordinated brutal attack"* captured on CCTV (see Sentence at paragraph 4).

[16] **Ground 2**- The Respondent submits that the allegation of double counting taking into account an aggravating factor that the Appellant had punched the first complainant

which was already reflected in the level of culpability as to the nature of offending, misconceived.

(G). Discussion/Analysis

[17] The grounds of appeal against sentence essentially challenge the fixing of the non-parole period too close to the head sentence, and double counting occurring in the fixing of the starting point and the addition of the aggravating factors. That such double counting has the effect of enhancing the sentence unlawfully.

[18] An appellate court will only interfere with sentence if the learned sentencing Judge had *acted upon the wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts, or failed to take into account some relevant considerations.* See **Kim Nam Bae v State** (supra).

Ground 1 - *Closeness of non-parole period to head sentence*

[19] The Appellant was sentenced to an aggregate sentence of 7 years imprisonment with a non-parole period of 6 years. The challenge is against the closeness of the non-parole period to the head sentence which, according to the Appellant denies and discourages the possibility of the Appellant's rehabilitation. However, the other side of the coin is that the gap between the non-parole term and the head sentence should not be such as to be ineffective as a deterrent: **Tora v State** FJCA 20 at paragraph 2.

[20] In **Navuda v State** (supra) the issue of the closeness of non-parole period to the head sentence was discussed at length and reviewed. There, the difference of 1 year was considered insufficient and the difference was increased to 2 years. Here, the difference is also 1 year which the Appellant argues is too close to the head sentence, and is a disincentive to rehabilitation.

[21] In sentencing the learned Judge, guided by the sentencing principles in **Tawake,** identified the common aggravating factor for all the Accused, and fixed a starting point of 7 years and a sentencing range of 5-9 years. (paragraph15 of sentence) The learned Judge noted that the culpability level of all offenders is almost on an equal footing. The robbery was committed in the company of each other, and although no weapon was used the level of violence was high. The complainant received some

injuries but they were not serious. The learned Judge characterized the harm as high as the psychological harm suffered by the victims, especially the children, was high-see paragraph 14 of Sentence.

[22] The learned sentencing Judge identified what he termed "common" aggravating factors which are common to all of the offenders, for example pre-planning, and for the aggravating features, 3 years was added to arrive at the aggregate sentence of 10 years – paragraph16 of Sentence. In addition, and for the Appellant (1st Offender) a further aggravating factor was added, in view of his actions in pulling and assaulting the Appellant repeatedly. An addition of 6 months was added to the Appellant's aggregate sentence, with the new total of 10 years and 6 months imprisonment. In mitigation, the sentencing Judge stated,

> *"19. Mr. Waqanivalu is a 36-year-old father married with a child. His wife is expecting another child. There are no significant mitigating factors for Mr. Waqanivalu. He receives no discount for his good character as he has 21 previous convictions of a similar nature, two of which are still alive. He had been in remand for this matter for approximately (3) years. I deduct six (6) months for mitigation and three (3) years for the remand period to arrive at an aggregate sentence of seven (7) years imprisonment for both offences. <u>His potential for rehabilitation is not that promising given his previous convictions. To balance his chances for rehabilitation with the concerns for community protection, I fix a non-parole period of 6 years.</u>"*
> (Underlining for emphasis)

[23] The learned sentencing Judge had meticulously taken time to setting out the sentencing steps, and had decided on a final aggregate sentence of 7 years imprisonment with a non-parole period of 6 years. The non-parole period was fixed to balance the Appellant's chance of rehabilitation (which was not promising given his previous convictions), and with the concerns for community protection. This ground has no prospect of success.

<u>Ground 2 - *Double-Counting*</u>

[24] The 1st Offender/Appellant had committed a distinct act which warranted additional aggravating factor-see paragraph 17 of Sentence. The 1st Offender / Appellant had

pulled the complainant and assaulted him repeatedly. As a result, 6 months was added to arrive at an interim sentence of 10 years and 6 months imprisonment. Having carefully considered the reasoning behind the fixing the non-parole period and the additional 6 months additional aggravating factor, and the arguments advanced by the Appellant in ths ground. I conclude that grounds 1 and 2 against sentence have no merit. They are not arguable.

Order of Court

1. *Application for leave to appeal against sentence is disallowed.*

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

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