

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

CRIMINAL APPEAL NO. AAU 086 OF 2018
[Lautoka High Court: HAC 172 of 2015]

BETWEEN : **KELEPI SALAUCA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Qetaki, RJA

Counsel : The Appellant In-Person
Mr. R. Kumar for the Respondent

Date of Hearing : 29 September, 2025

Date of Ruling : 22 December 2025

RULING

(A). Background

- [1] The appellant was jointly charged with two others for one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009.
- [2] After summing up on 14 June 2018, the learned trial Judge in a judgment delivered on 15 June 2018 agreed with the unanimous opinion of the assessors that the appellant was guilty as charged and convicted the appellant accordingly.
- [3] On 10 July 2018, the appellant was sentenced to 13 years imprisonment. Having deducted 2 years and 23 days remand custody period, the appellant was to serve 10 years 11 months and 7 days with a non-parole period of 9 years imprisonment.

[4] The appellant had initially filed an appeal for both conviction and sentence and had later abandoned his sentence appeal and proceeded with the conviction appeal only. There is no indication that the appellant had formally abandoned the sentence appeal in accordance with the practice of the appellate courts, and in the Supreme Court the appellant applied for his leave to appeal sentence to be “reinstated” out of time.

[5] The Supreme Court in **Kelepi Salauca v State** Criminal Petition No. CAV0021 of 2023 (per Keith, J), in determining the appellant’s appeal against conviction, having stated that it had no jurisdiction to deal with the sentence appeal, at paragraph [50] of judgment stated:

“.....Accordingly, now that Kelepi no longer wishes to proceed with his application to abandon his appeal against sentence, I would direct that his appeal against sentence be considered by the Court of Appeal determining whether the leave to appeal should be granted. In view of the delay, I would order that the hearing of that application be expedited and listed to be heard no later than 6 weeks from today.”

[6] It was ordered by the Supreme Court that:

“(2) The applicant’s application for leave to appeal sentence be heard and determined by a single judge of the Court of Appeal and be listed for hearing within 6 weeks from 29 April 2025.”

[7] The appellant had also filed a Submission of Sentence Appeal and Leave Out of Time on 5 June 2025, and a Notice of Motion for Appeal Against Sentence and Bail Pending Appeal dated 1 July 2025 with a sworn Affidavit in Support.

[8] The facts are well stated in the decision of the Supreme Court aforesaid at paragraphs [1] and [2]. The men involved in the aggravated robbery were jointly charged and all pleaded not guilty at the trial.

[9] Given that the original notice of appeal was within time after the delivery of sentence on 10 July 2018 and the appeal was against both conviction and sentence; and in consideration of the observations of the Supreme Court followed by its order with regard to the appellant’s sentence appeal, it is appropriate in my view to treat the

sentence appeal as timely and to be regarded as such in this proceeding for leave to appeal against sentence.

(B). Grounds of Appeal

[10] There are 3 grounds of appeal against sentence urged by the appellant, as follows:

Ground 1: *That the learned sentencing Judge had erred in law in failing to consider the 7 months and 3 days remand period served by the appellant from the day of arrest and produced in court until bail granted on 19 March 2016 as per section 24 of SPA of 2009.*

Ground 2: *That the learned sentencing Judge had erred in law in falling into a trap of double counting in paragraph 21 of the sentence in considering the seriousness of the offence with a starting point of 11 years [which is somewhere in the middle range] and then later add another 4 years imprisonment for the aggravating factors without specifically stating as to what aggravating factors considered adding 4 years and the gravity of aggravating circumstances that is suitable to take 11 years as starting point and 4 years for aggravating factors .*

Ground 3: *That the learned sentencing Judge had erred in law in imposing a sentence of non-parole term of 9 years imprisonment without assessing the lawful and legality of how the non-parole period will lawfully operate in legal combination with the requirements of the then existing law (namely Corrections Act Section 27 and 28 read with the Corrections Service Regulations of 2011, despite the amendment on section 27 of the Correction Act 2009, having considered sections 173(3) (a),(b),(i) and (ii) of 2013 Constitution.*

(C). Appellant's case

[11] Ground 1-The appellant submits that section 24 of the Sentencing and Penalties Act 2009 provides that all the accused persons are entitled to a further reduction in sentence for the remand period. The sentencing Judge merely deducted 2 years 23

days from the total time served in remand without stating any reason for not taking account of the remaining time served in remand, which is 7 months and 3 days.

[12] Ground 2-The appellant challenged the trial Judges list of aggravating factors in paragraph 11 (a) – (d) of the sentencing as follows:(a) Early morning invasion; (b) Home invasion; (c) Pre-planning, and (d)Vulnerability. The appellant argues that these factors must have been considered already when the objective seriousness of the offence when fixing a starting point-see paragraph 21 of sentence. There is definitely an element of double counting. The appellant submits that paragraph 11(a) and (b) are the similar and ought to be taken as one only.

[13] The appellant submits that it is wrong to rely on **Wise v State** (2015) FJSC 7; CAV 0004 of 2015 (24 April 2015), which established the tariff for home invasion at 8 – 16 years. He stated that a tariff is a guideline only. It does not take away the discretion of the sentencing court to impose a sentence that is best suited to the circumstances of the offence.” The appellant submits that the guidelines in **Tawake v State**, CAV00025 of 2019 (28 April 2022) where the Supreme Court identified the starting points and the sentencing ranges for the three categories of robbery and aggravated robbery into “High”, “Medium “and “Low”, is appropriate to follow, as it allows the Judge to consider what the starting point should be, based on the peculiar fact of each case. The Guideline was established on 28th April 2022 as follows:

“There is no need to establish 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 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 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.

Once the level of harm suffered by the victim 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 appropriate sentencing range.”

- [14] The appellant approves of the approach echoed by Keith, J’s comments at paragraphs 56 and 57 in **Kumar v State** CAV 0017 of 2018 (2 November 2018). The effect of which is, whatever methodology is used, the ultimate sentence should be the same. If a Judge takes as starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The effect of which is, if a Judge chooses a starting point somewhere in the middle range, that is an error which a Judge should avoid, the appellant submits that 4 years aggravating factors added to 11 years starting point cannot be right or acceptable.
- [15] The appellant denies the commission of violence specified in paragraphs 1-5 of sentencing, arguing that the violence committed does not compare to the violence used in **Wise**, given the seriousness of the facts of that case, and the approach taken by the Judge in sentencing. The appellant submits that his previous good character was not considered by the Judge unlike the Judge’s approach in **Wise**.
- [16] Ground 3: The appellant after discussing the provisions of sections 27 and 28 of the Corrections Service Act on *Initial Classification*, which has been amended, and the decision on remission in: **Timo v State** CAV 0022 of 2018 at paragraph 2. Section 18 Sentencing and Penalties Act 2009. Amendment to Corrections Act 2019 -sections 27 and 28-effects and implications. **Raogo v State** CAV003 of 2010 (19 August 2010) at paragraph 16, submits that:”..... *being s first offender having no previous convictionthe appellant is an appropriate candidate to be allowed the benefit of the one third remission without an order for a period of ineligibility for parole”*.

(D). Respondent’s case

- [17] Ground 1-The respondent concedes that the learned trial Judge did not take account of the whole of the time already served by the appellant while in remand. The trial Judge had only taken account of 2 years and 23 months, when it appears that the total applicable remand period for the appellant as relevant to substantive HAC 172 of 2015, was 2 years, 6 months and 12 days. There ought to be a downward adjustment made as a result of the error. The ground has merit.

- [18] Ground 2-This ground is opposed by the respondent as “it is not every step in the sentencing process which is key as it is the ultimate sentence which is of importance”. This was a violent home invasion sentence where the applicable tariff was 8 to 16 years imprisonment. The ground of appeal may appear persuasive but does not have a reasonable prospect of success vide Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006).
- [19] Ground 3- This ground is also opposed by the respondent. It submits that in light of the observations of the Supreme Court in Kreimanis v State [2023] FJSC 19; CAV13.2020 (29 June 2023), all of the appellant’s complaints about the imposition of a non-parole term and the length of his non-parole term are misguided. The ground has no reasonable prospect of success.
- [20] The respondent concludes by submitting that leave to appeal sentence may be properly allowed only for ground 1.

(E). Discussion/Analysis

- [21] The guidelines to be followed when a sentence is challenged on appeal were outlined in Kim Nam Bae vThe State [1999] FJCA 29, as follows, when a Judge:
- (a) *Acted upon a wrong principle;*
 - (b) *Allowed extraneous or irrelevant matters to guide or affect him;*
 - (c) *Mistook the facts;*
 - (d) *Failed to take into account some relevant consideration.*
- [22] Both the appellant and the respondent had made written and oral submission- see paragraphs [11] to [20]. The submissions have been carefully analyzed and considered and the outcome determined, as follows:
- [23] **Ground 1:** There is no dispute on the ground. Both the appellant and the respondent agree that under section 24 of the Sentencing and Penalties Act 2009, the learned trial judge should have deducted the full term which the appellant had served in remand. The ground is arguable and has merit.

[24] **Ground 2:** This ground is opposed by the respondent. The issue of possible double counting is validly raised. That opens up the discussion of the starting point and sentencing rankinite of the authorities raised by the appellant, it may be useful for the full Court to examine the ground also. The ground is arguable. It has merit.

[25] **Ground 3:** The ground relates to the application of sections 27 and 28 of the Corrections Act 2019 on *Initial Classification and Remission of Sentence*. How they sit with section 18 of the Sentencing and Penalties Act 2009 on imposition of a non-parole period.

[26] The courts had made several decisions on this important aspect of sentencing and related issues, which are often raised in sentence appeals. In **Ismail v The State**, CAV0002 of 2022 the Supreme Court stated (per Temo Acting CJ), referring to the practice of the Corrections Service of applying the entitlement to remission only to the sentence remaining to be served after the non-parole period has been completed, as follows:

*“However, in Kreimanis v State, the Supreme Court stated that this approach was incorrect, given the language of section 27(2) of the Corrections Service Act. The subsection provides for the purpose of initial classification “the date of release for the prisoner shall be determined on the basis of remission of one third of the sentence **not taking into account the non-parole period**” (emphasis added). The background to this subsection is explained in Calanchini’s judgment in Kreimanis.”*

[27] In the case of **Tora v State** Criminal Appeal N0.AAU0063 /2001, Calanchini JA stated:

“.... to fix a minimum term that the appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of Sentencing and Penalties Act as to the matters should be considered when fixing the non-parole period, it is my view that the purpose of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result, the non-parole period should not be so close to the head sentence as to delay or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term

and the head sentence be such as to be ineffective as a deterrent.” (Underlining for emphasis)

[28] The above sentiments was viewed favorably in **Navuda v State** [2023] FJSC 45, where the Supreme Court, in paragraph [47] of its judgment stated:

“Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise, there will be little incentive for prisoners to behave themselves in prison, and the advantage of incentivizing good behavior in prison by the granting of remission will be lost.....”.

[29] The ground is arguable. It has merit.

(F). Conclusion

[30] In consideration of the foregoing discussion, the application for leave to appeal sentence is allowed.

Orders of Court:

1. *The appellants’ application for leave to appeal against sentence is allowed on all the grounds.*



A handwritten signature in black ink, appearing to read "Alipate Qetaki", written over a horizontal line.

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors

The Appellant In-Person

Office of the Director of Public Prosecutions for the Respondent