

**IN THE SUPREME COURT OF FIJI**  
**[CRIMINAL APPELLATE JURISDICTION]**

**Criminal Petition No: CAV 0009 of 2022**  
[On Appeal from the Court of Appeal No: AAU0040/17]

**BETWEEN** : **JOELI TAWATATAU** *Petitioner*

**AND** : **THE STATE** *Respondent*

**Coram** : The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court  
The Hon. Mr. Justice Terence Arnold, Judge of the Supreme Court  
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

**Counsel:** Mr J. Rabuku and Mr L. Cati for the Petitioner  
Mr R. Kumar for the Respondent

**Date of Hearing:** 3<sup>rd</sup> October, 2023

**Date of Judgment:** 26<sup>th</sup> October, 2023

**JUDGMENT**

**Gates, J**

[1] I have read in draft the judgment of Qetaki J. I am in agreement with it and with the orders proposed. The sentence appeal, refused by the single judge, was not in the end pursued before the Full Court of the Court of Appeal. The petitioner must first raise it, if he so wishes, before that Court.

**Arnold, J**

[2] I have read the judgment of Qetaki J in draft and agree with the orders proposed.

**Qetaki, J**

[3] On 27 June 2016 the petitioner (with another) was convicted after trial by the Nausori Magistrates' Court (under extended jurisdiction) for the following two counts:

**Count 1**

**Statement of offence**

*Aggravated Robbery, contrary to section 311(1) (a) of the Crimes Decree 2009; and*

**Particulars of offence**

*Joeli Tawatatau and Leone Vakarusaqoli on 31<sup>st</sup> day of March, 2011, at Naduru Road, Nausori in the Central Division, immediately before committing theft, he used force and robbed Ravin Prasad of assorted jewelries' valued at \$9,500.00, cash \$200.00, one Easy Telephone valued at \$90.00, one Nokia mobile phone valued at \$300.00, one pair Nike canvas valued at \$200.00, one Kenwood brand radio valued \$2000.00 and vehicle registration number FN 508 valued \$40,000 all the total value \$52,140.00.*

**Count 2**

**Statement of offence**

*Resisting Arrest: contrary to section 277(a) of the Crimes Decree No.44 of 2009.*

**Particulars of offence**

*Joeli Tawatatau, on the 31<sup>st</sup> day of March, 2011, at Tacirua in the Central Division, resisted lawful apprehension.*

[4] Apart from the description of the incident by the victims, there are no direct evidence as the Petitioner and his co-accused were wearing masks at the time of the commission of

the crime. According to the victim Ravin Prasad, on 31<sup>st</sup> March 2011, at around 2:30am. Whilst at his home, he was awakened by a noise coming from the house. He raised cries, but the masked men who had already entered the house had ordered them to remain quiet. The other inmates, the wife and the two children also entered the room where he was in. The intruders have ransacked the house, assaulted Prasad's wife and having collected the valuables that belong to them, fled away from the scene of the crime with their Toyota vehicle. The witness later identified stolen items at the Courts.

- [5] In a nutshell, the primary offending had been a night time group invasion aggravated robbery (count 1), committed by the petitioner and others (who were masked) at about 2:00-2:30 am on 31 March 2011, where they invaded the home of the complainant (victim) Ravin Prasad in Nausori and had violently robbed him and his family (with wife and 2 children) before making off with assorted property items to the amount of \$52,140.00.
- [6] The prosecution had relied upon the evidence founded on the *doctrine of recent possession against* the petitioner, where inter alia, assorted jewelries and a phone had been recovered from his possession by the Police at about 7:30am on 31 March 2011 in Tacirua, contained in a black bag. The recovered properties were positively identified by Ravin Prasad to have been stolen from his home at the material time. According to the prosecution witnesses, the petitioner had thrown the said black bag containing the stolen items in front of approaching Police Officers Timoci Bola and Vereti Bogitini and had ran away from them before he was arrested. And it was this lawful arrest that the petitioner resisted by trying to punch the said Police Officers, which is the subject of Count 2.
- [7] After trial, the learned Magistrate on 27 June 2016 found the petitioner guilty and by 29 May 2017 the petitioner was sentenced to 10 years imprisonment with a non-parole period of 9 years on the first count. On the second count the petitioner was sentenced to 9 months imprisonment, both sentences were directed to run concurrently.

- [8] The Petitioner applied for leave to appeal to the Court of Appeal before a Learned Single Judge under Section 21 (1) (b) and (c) of the Court of Appeal Act on four grounds, three grounds against conviction and one ground against sentence. Having considered the grounds, the learned single Judge in his Ruling on 20 May 2020 refused leave against both conviction and sentence.
- [9] Aggrieved by the Ruling of the Learned Single Judge the petitioner filed a Renewal Notice against Conviction (on 21<sup>st</sup> May 2020), for the Full Court's consideration. For the reasons given in the Judgment dated 3 March 2022 the petitioner's conviction was affirmed, the Court, being satisfied that his conviction was well founded, dismissed the appeal.
- [10] The petitioner now seeks special leave to appeal his conviction and sentence as set out in his application dated 7 April 2022, filed on 28 April 2022 where he raised four grounds of appeal against conviction, and three grounds against sentence. He prays that special leave to appeal be granted, and for his conviction and sentence to be quashed.

### **Petition Grounds**

#### [11] **Conviction Grounds**

##### **Ground 1**

*Did the Court of Appeal erred when it did not conclude that a substantial miscarriage of justice and serious prejudice has occurred in relation to the trial Magistrate's acceptance of the co-accused Police caution interview to form the conviction finding against the petitioner?*

##### **Ground 2**

*Did the trial Magistrate erred causing prejudiced and unfairness when it accepted overlooking the evidence of items produced which was contradicting this aggravates the offending of the case?*

### **Ground 3**

*Whether the petitioner's trial proceedings held in the Magistrates' Court a nullity, and void on the basis that the indictment charge was unsigned and not made on oath by the authorized presenting officers to procedural irregularities and flows causing serious injustice?*

### **Ground 4**

*Did the Court of Appeal erred in affirming the conviction of the petitioner on the basis of recent possession when in fact the prosecution's case was doubtful in relation to the chain of events on the recent possession thus the Court of Appeal has failed to make a proper assessment on the doubt's resulted to a substantial miscarriage of justice?*

### **Grounds for Sentence**

- A. *That the learned sentencing Magistrate erred in law and in fact when he fixed a non-parole period of 9 years in the absence of the function of the parole board [Act upon a wrong principle].*
  
- B. *That the sentence is inappropriate as:*
  - i) *Non-availability of the parole board to design the Law of Parole.*
  - ii) *Non-availability of parole board has being undermine the purpose of section 18(1)(6) of the Sentencing Penalties Act.*
  
- C. *Double Jeopardy*
  - i) *Miscalculating of non-parole period of 9 years and set off period of 1 year from the total sentence of 10 years, which will serve an extra 8 months after the completion of 9 years non-parole.*
  - ii) *Additional punishment imposed by the State at their custody during arrest, detained, remand and convicted; and serving from first day until today....which contradicted to the committal warrant.*

### **Withdrawal of conviction appeal**

- [12] The petitioner did not file a written submissions to support the grounds of appeal. Counsel's firm had communicated with the Supreme Court Registry on 29<sup>th</sup> September 2023 advising as follows: *"While we have not filed any written submissions and therefore we will not touch on the appeal proper we would appear on 3<sup>rd</sup> October to advise the full Court of other peripheral matters concerning our client's sentence."*
- [13] At the hearing on 3<sup>rd</sup> October 2023, Counsel informed the Court that the petitioner intends to withdraw his appeal against conviction. The Court sought assurance that the petitioner is aware of the withdrawal of the conviction appeal and its effect. The petitioner was consulted on the matter and assured the Court of his intention to withdraw the grounds against conviction. The Court noted the withdrawal of the appeal against conviction.

### **Sentence appeal**

- [14] Counsel sought clarification on the petitioner's sentence .The Court directed Counsel to prepare and file his written submissions by the 12<sup>th</sup> of October 2023, with the respondent to reply on 13 October 2023.Counsel did not file a submission.
- [15] The petitioner had sought leave against sentence before a learned single judge (Prematilaka JA,) on the ground that the non-parole period is too close to the sentence thus making the sentence harsh and excessive and the non-parole period denies him the chance of rehabilitation. Leave was refused.
- [16] The petitioner filed a Renewal Notice of Appeal on 21 May 2020 before the Full Court of Appeal. It is evident from the judgment of the Court of Appeal that the Court did not deal with the appeal against sentence, and there is no explanation on it.
- [17] The grounds of appeal against sentence in this Court is much wider, but also includes the ground earlier raised before a single judge and the Full Court of Appeal. The Court of Appeal did not make a final judgment on sentence. In light of section 98 (3) (b) of the

Constitution, this Court has no jurisdiction to make a decision on the sentence appeal and the matter is to be dealt with in the Court of Appeal should the petitioner chooses to pursue the matter further.

**Order:**

1. *Appeal against conviction withdrawn.*
2. *Petitioner's conviction and sentence affirmed.*



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**The Hon Mr Justice Anthony Gates**  
JUDGE OF THE SUPREME COURT

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**The Hon Mr Justice Terence Arnold**  
JUDGE OF THE SUPREME COURT

A handwritten signature in blue ink, appearing to be "A. Qetaki", written over a horizontal line.

**Hon Mr Justice Alipate Qetaki**  
JUDGE OF THE SUPREME COURT