IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 109 OF 2013
High Court Criminal Case: HAC 225 of 2011 [Lautoka])

BETWEEN : **AINARS KREIMANIS**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsel : **Appellant in person**
Mr S Babitu for the Respondent

Date of Hearing : **3 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I have read in draft the judgment and the conclusions of Nawana JA and I agree with them.

Prematilaka JA

[2] I have read in draft the judgment of Nawana, JA and agree with reasons for refusing enlargement of time against the sentence on all grounds urged but would like to make a few observations of my own.

[3] With the refusal of enlargement of time, there is no appeal against sentence before this court. However, had enlargement of time against sentence been granted this court would have had to consider his appeal against sentence and in that event this court also had the power to act under section 23(3) of the Court of Appeal Act to quash the sentence and pass such other sentence (whether more or less severe) in substitution. Therefore, at the outset the appellant was informed of the power of the Court of Appeal to pass any other sentence warranted by law in terms of section 23(3) of the Court of Appeal Act if it thinks that a different sentence should have been passed, afforded an opportunity for him to make representations in that regard and also informed the appellant that, however he was free to canvass his appeal regardless if he so wished [vide **Kumar v. The State** Criminal Appeal No. AAU 0018J of 2005: 29 July 2005 [2005] FJCA 54 and **Mani v State** [2017] FJCA 119; AAU0087.2013 (14 September 2017)]. Nevertheless, he decided to prosecute his appeal against sentence.

[4] The reason for the above warning was that in **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019) the tariff for possession of Methamphetamine above 01kg was set at 20 years to life imprisonment (Category 05) and the sentence of 13 years and one month for possessing 5.6279 kg of Methamphetamine imposed on the appellant is far below the tariff set in ***Abourizk*** and inadequate. In addition an accused cannot claim that as of right he should be dealt with only in terms of the tariff regime under which he was sentenced when his sentence is reviewed in appeal as retrospectively principle would not apply to tariff set by court [vide the decisions in **Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200 and **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019)**].**

[5] Nevertheless, since enlargement of time is refused and consequently there is no appeal against sentence before this court, application of section 23 of the Court of Appeal does not arise now.

Nawana JA

[6] This is an appeal by Mr Ainars Kreimanis, the appellant (the appellant), against his conviction on a charge of possession of *methamphetamine*, an illicit drug, punishable under Section 5 (a) of the Illicit Drugs Control Act, 2004, of Fiji (the Act).

[7] *Methamphetamine*, a psychotropic substance under Schedule II of the International Convention on Psychotropic Substances, 1971, has been declared an illicit drug in Fiji within the meaning of Section 2, read with Schedule 1 of the Act, which, in the view of this court, is the domestic legislation in Fiji that contains provisions corresponding to the International Convention on Psychotropic Substances.

[8] Section 2 of the Act proscribes any person from possessing; supplying; producing; manufacturing; cultivating; using; or, administering any illicit drug in Fiji. Section 5 of the Act in *verbatim* is to the following effect:

> *Any person who, without lawful authority –*
>
> *(a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or*
> *(b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug,*
> *commits an offence and is liable on conviction to a fine not exceeding $1 million or imprisonment for life or both.*

[9] The appellant, a Latvian national, arrived in Fiji on board of a flight from Hong-Kong on 11 November 2011. He was detected with the illicit substance of *methamphetamine* concealed inside photo frames in his baggage at the border control area of the Nadi International Airport, Nadi, Fiji. The weight of the illicit

substance that the appellant had possession of was 5, 627.9 grams (5 kilograms and 628 grams).

[10] The appellant was, thereupon, interrogated and detained as an investigation was conducted by the law enforcement authorities in Fiji. At the conclusion of the investigation, the appellant was arraigned and charged before the High Court in Lautoka, Fiji, on the basis of the information dated 01 May 2012 presented by the Director of Public Prosecutions (DPP) containing a charge under Section 5 (a) of the Act.

[11] The charge read as follows:

> ***UNLAWFUL POSSESSION OF ILLICIT DRUGS****: Contrary to section 5 (a) of the ILLICIT DRUGS CONTROL ACT of 2004.*
>
> ***Particulars of Offence:***
>
> ***AINARS KREMANIS*** *on the 11th day of November 2011 at NADI in the* ***WESTERN DIVISION*** *without lawful authority was found in possession of illicit drugs, namely* ***METHAMPHETAMINE*** *weighing 5,627.9 grams or 5.6279 kilograms.*

[12] At the trial, officials of Fiji Customs and Border Police of Fiji on duty at the Nadi International Airport, Nadi, Fiji, gave evidence on the recovery of the illicit substance from the baggage of the appellant. The Government Analyst of Fiji Forensic Laboratory testified that the recovered substance was confirmed to be *methamphetamine* after an analysis, which is an illicit drug as declared by the Act. The appellant gave evidence on his own behalf and did not disclaim the baggage where the illicit drug was detected as the baggage carried by him.

[13] At the conclusion of the trial, the appellant was found guilty by a unanimous opinion of the assessors on 01 October 2013. The learned trial judge agreed with the unanimous opinion of the assessors. The appellant was, thereupon, convicted by the learned trial judge. After a hearing on the issue of sentence, the appellant was sentenced to a term of thirteen years and one month with a non-parole period of twelve years, on 15 October 2013.

[14] The appellant, by a notice dated 28 October 2013, sought leave to appeal against both the conviction and the sentence within the prescribed time of one month in terms of Section 26 of the Court of Appeal Act.

[15] The appellant was represented by legal counsel of the Legal Aid Commission of Fiji in support of the application for leave to appeal. The grounds urged in the amended notice of appeal filed by the Legal Aid Commission dated 20 July 2014 on the appellant's behalf, were:

(i) The learned judge caused the trial to miscarry when:

(a) He allowed the unrepresented appellant to endorse the agreed facts, which limited the ability of the unrepresented appellant from asking pertinent questions regarding his case; and,

(b He did not make necessary arrangements for a translator who spoke the Russian language to be present to assist the unrepresented accused.

(ii) The learned trial judge erred in law and fact when he unfairly disallowed the unrepresented appellant from asking questions with reference to previous inconsistent statements of witnesses.

(iii) The state acted unfairly when they did not call as a witness the Russian translator who had interpreted during the appellant's caution-interview process.

(iv) The learned trial judge erred in law when his comments at paragraph 20, 44 and 62 of the summing-up prejudiced the appellant.

(v) The learned sentencing judge erred in law and fact when he chose a starting point of sentencing without any proper basis as a result of the absence of any tariff on the said offending.

(vi) The learned sentencing judge erred in law and fact when he chose as an aggravating feature matters which had already been accounted for when the court had convicted the appellant.

[16] A single Justice of Appeal, by ruling dated 16 January 2015 after a hearing where the appellant was represented by legal counsel, refused leave to appeal against the conviction and the sentence holding that none of the grounds was arguable as they had no merit in order to consider the grant of leave to be

considered by full court, in the exercise of jurisdiction in terms of Section 35 (i) read with Section 21 (1) of the Court of Appeal Act.

[17] At the hearing before the full court, the appellant appeared in person. He had previously waived his right of being represented by counsel and continued to do so at the hearing before this court as well. This court made it clear that the appellant still could exercise his right to legal counsel if he chose to do so. The appellant, despite court's indication, chose to appear in person for himself and continue with the hearing.

[18] The appellant did not request the assistance of an interpreter conversant either in Latvian or Russian for this hearing. The appellant, thereupon being questioned by court, stated that he could understand the proceedings of the court and that he was competent to take part in the proceedings on his own behalf.

[19] This court, after being satisfied itself that the appellant could comprehend the proceedings well and that he knew what the nature of the proceedings and the task that he had to perform as the appellant appearing in person on his own behalf, decided to proceed with the hearing as the court found that the absence of a legal counsel and an interpreter would not hamper the proceedings or prejudice the appellant.

[20] Court next explained to the appellant that Justice Nawana had presided over the initial proceedings of his case before the substantive matter of his guilt was subsequently determined at a trial before another judge of the High Court, Lautoka. On being enquired, the appellant stated that he had no objection to the composition of the court with Justice Nawana sitting as a member as Justice Nawana was not involved in the trial that gave rise to the proceedings before this court.

[21] Perusal of the record showed that the appellant had submitted a document dated 17 June 2016 containing a series of new grounds challenging both the conviction and the sentence. Moreover, the appellant had further submitted a

document dated 09 October 2019 containing three new grounds only against the sentence.

[22] The appellant submitted that he would not be pursuing any of the grounds urged at the stage of leave to appeal; or, the grounds set-out in the document dated 17 June 2016. Instead, he relied only on the grounds set-out in his document dated 09 October 2019, which were entirely new grounds challenging only the sentence and chose to abandon the challenges against the conviction.

[23] Despite the absence of a formal application for enlargement of time to pursue new grounds of appeal, court questioned the appellant whether he was determined not to pursue the challenges against the conviction. The appellant answered in the affirmative and stated that he was accepting the conviction and assigned it as the reason for the abandonment of the challenges against the conviction. On being asked, the appellant stated that he was abandoning the challenges against the conviction on his own free will, without being influenced or pressurized by anybody. The appellant stated that he knew that the outcome of abandoning any challenges against the conviction at this stage would leave no more opportunity for him to challenge the conviction in an appeal before this court and that the conviction would stand in force.

[24] Court, in the circumstances, permitted the appellant's application not to proceed with the matters pertaining to the conviction as the court was able to form the view that the unrepresented appellant was conscious of the effect of his application not to proceed with matters challenging the conviction and its consequences.

[25] The appellant, accordingly, sought leave of court to make submissions in support of his challenges against the sentence on the basis of the grounds set-out in the document dated 09 October 2019. Court, having considered the matters, allowed the appellant to make submissions challenging the propriety of the sentence on the basis of the grounds urged, although belatedly. Considering the fact that the appellant was appearing in person, an adjournment of twenty

minutes was, however, given enabling him to be prepared further on the lines of his argument. The appellant was content with the length of the adjournment.

[26] The three grounds urged against the sentence were:

> *(i) The learned High Court Judge erred by not taking the appellant's remand period as the time already served according to Section 24 of the Sentencing and Penalties Act, 2009;*
>
> *(ii) The learned High Court Judge erred by placing a non-parole period on the appellant's sentence and not taking into account Section 18 (2) of the Sentencing and Penalties Act, 2009; and,*
>
> *(iii) The learned High Court Judge erred by fixing the non-prole period too close to the head sentence [not giving any the appellant any hope of rehabilitation or incentive of good behavior whilst in prison], which is against the practice in other Commonwealth jurisdictions.*

[27] The above grounds are totally unconnected to the grounds urged in the appellant's timely application for leave to appeal, which stood refused. Hence, the matter before this court could not be considered as a renewal application in terms of Section 35 of the Court of Appeal Act.

[28] Considering the fact that all three grounds were raised for the first time against the sentence, there should have been a formal application for enlargement of time to constitute a proper appeal in terms of Section 35 of the Court of Appeal Act. Conversely, the appellant had submitted the above grounds only on the basis of '*[s]ubmissions by the appellant on sentence appeal'* in his document dated 09 October 2019.

[29] Learned counsel for the state objected to the grant of the application for leave to appeal on the grounds of the long delay and submitted that the applicable rules in regard to the enlargement of time should be considered by court.

[30] This court decided to consider the document dated 09 October 2019 as a document containing a plea for enlargement of time for leave to appeal as the appellant, appearing in person, was not understandably positioned in an ordinary setting conversant with the legal procedures in Fiji in consequence of his foreign nationality.

[31] The court, however, had to be guided by the law governing the enlargement of time for leave to appeal. The law is clearly set-out by the Judicial Committee of the Privy Council in the United Kingdom in ***Ratnam v Cumaraswamy*** [1964] 3 All ER 933 at 935, where it was stated:

> *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*

[32] The exercise of the discretion by court was explained by way of a series of guidelines as the Supreme Court of Fiji considered the matter on enlargement of time in ***Kumar v State*** and ***Sinu v State*** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17, where it was held that:

> *Appellate courts examine five factors by way of a principled approach to such applications. Those factors are: (i) the reasons for the failure to file within time; (ii) the length of the delay; (iii) whether there is a ground of merit justifying the appellate court's consideration; (iv) where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed ?; and, (v) if time is enlarged, will the respondent be unfairly prejudiced.?*

[33] The Supreme Court of Fiji, having reinforced the above criteria, reiterated on the discretion and its purposive exercise in dealing with applications for enlargement of time. The Supreme Court held in ***Rasaku v State*** CAV0009; 0013 of 2019: 24 April 2013 [2013] FJSC 4 that:

> *The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed specific period for lodging his application.*

[34] The above principles were adopted and applied, as recently as in June 2019, in the case of ***Nasila v the State*** [2019] FJCA 84; AAU0004 of 2011: 06 June 2019 in dealing with a similar application for enlargement of time, where it was held that the new grounds should be considered subject to the guidelines applicable for enlargement of time to file an application for leave to appeal.

[35] The appellant in his document dated 09 October 2009 states that:

> *The appellant apologizes for any delay or inconvenience he has brought to this Honourable Court. [H]e is from Latvia and speaks broken English now, however upon conviction he could not speak proper English, this has caused a delay in appeal and he humbly seeks the court's forgiveness.*

[36] This court is certainly possessed of the appellant's circumstances of being an alien to this jurisdiction. However, to the appellant's credit, court is also considerate of the fact that the appellant had canvassed his conviction and the sentence, though unsuccessfully, in a timely application for leave to appeal within the statutory time limit as provided under Section 26 of the Court of Appeal Act. Therefore, no laches or negligence could be attributed to the appellant. Instead, the appellant could be seen as a person who was desirous of redressing himself through a statutory mechanism under the Fijian system but for its procedural intricacies.

[37] The appellant, having no other alternative within his sight to see an ending to his long predicament of imprisonment, appears to have, in the circumstances, filed the challenge against his sentence, based on the three grounds as set-out above. This court views that such an endeavor alone was the only legally permissible avenue to seek regaining the freedom over his imprisonment.

[38] The delay, when counted from the date of the sentence is more than six years; and, when counted from the date of refusal of leave to appeal is more than four years. In either case, in this court's view, the delay is substantial and it should not usually be permitted. However, considering the exceptional positioning of the appellant and the circumstances enumerated above that could have contributed to the delay, in my view, delay by itself, should not operate as a bar for this court to refuse the appellant's plea to revisit the propriety of the sentence.

[39] In the result, I am inclined to take the view that this court should consider the matter on applying an objective test to see whether there are grounds of merit justifying this court's consideration as stipulated by the Supreme Court and by this court in ***Nasila's*** (supra) case. In the process, I will consider each ground to see whether there is merit in each one of them.

Ground One

[40] The appellant complains that the learned High Court Judge had erred by not taking the appellant's remand period as time already served in terms of Section 24 of the Sentencing and Penalties Act, 2009 (SP Act). Section 24 of the SP Act states as follows:

> *If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.*

[41] The above statutory provision was given effect to in ***Tevita Banuve v State*** [2014] FJCA 209; AAU 0095 of 2012, as rightly relied on by the appellant. The Fiji Court of Appeal held in that case that:

> *Remand period is a relevant consideration that must be taken into account by the court exercising sentencing discretion. Section 24 of the Sentencing and Penalties Decree endorses the principle of making allowance for remand period in sentence. The failure by the learned Magistrate to take the appellant's remand period was an error.*

[42] As submitted by the appellant, the reduction of the period of custody on remand from the sentence, was recognized in ***Etuate Suguturaga v State*** [2014] FJCA 206 AAU 0084.2010; and, in ***Pauliasi Mataunitoga v State*** [2105] FJCA 70; AAU 125.2103. I find no authority to hold a contrary view.

[43] This being the judicial approach to give effect to the statutory provisions of Section 24 of the SP Act, this court is now tasked to consider whether the learned sentencing judge had duly considered the required reduction of the sentence on the basis of the appellant's detention prior to him being sentenced on 15 October 2013.

[44] It is apt to consider broadly how the learned judge had dealt with the issue of sentence in order to understand the legality and the propriety of the sentence before dealing with the issue of reduction of reman period in isolation.

[45] The learned judge, in finding out the appropriate range of sentence for a specific drug- related case, relied on ***R v Ratu*** [2006] 2NZLR 72 (CA) where it was held that the sentencing brand for cases involving the sale or supply of methamphetamine of very large commercial quantities (500g or more) is ten years to life imprisonment. The learned judge suitably adopted the crown position in that case. It was observed:

> *Methamphetamine abuse can fairly be characterized as the most serious drug problem the country faces at present. The various ways in which the drug threatens the community are well-known. Methamphetamine is a particularly destructive drug for users; it is highly addictive with profound mental and physical side-effects. It induces aggressive and irrational behavior, and is regularly responsible for other offending involving extreme violence, a phenomenon not commonly associated with other drugs. It has created a thriving industry, in which organized crime is heavily involved at all levels. The manufacturing process is particularly dangerous. It is submitted, with respect, that if it is appropriate to draw any distinction between Class A drugs, methamphetamine can fairly lay claim to a place in the most serious category.*

[46] The learned judge had duly considered the destructive nature, addictive inclination and the inherent societal impact that could pose from the illicit drug of *methamphetamine* in selecting a slightly higher middle point at fourteen years within the range of 10-16 year-imprisonment for the offence for which the prescribed punishment has been life imprisonment. The learned judge relied on the authorities in Fiji and in another contemporary jurisdiction in order to base his decision and added two years for factors of the high weight of 5.6279.00 KG; and, the manner of concealment inside photo frames holding that they had aggravated the offending. the learned judge then deducted the sentence by one year on account of the fact that the appellant was found to be a first offender and that he was the father of two children and reached the term of fifteen years.

[47] It was not in dispute that the appellant had been kept in pre-trial detention on remand for 23 months. The learned judge then deducted the entire twenty three-month period of remand and set the sentence as thirteen years and one month in terms of paragraph 20 of the sentencing ruling dated 15 October 2013. The sentence was subject to the non-parole period of twelve years.

[48] In the circumstances, the appellant's complaint that the learned judge had not considered the required reduction of his period on remand under Section 24 of the SP Act is not factually correct. Hence, I find absolutely no merit in the ground urged in support of his application for enlargement of time. I reject the first ground urged in this application.

Ground Two.

[49] The appellant, in his second ground, seeks to raise an issue on the basis that the learned judge was in error by placing him on a non-parole period without taking into account the provisions of Section 18 (2) of the SP Act. The appellant called in aid the judgment of the Supreme Court of Fiji in ***Timo v the State***; CAV 0022 of 2018: 30 August 2019 [2019] FJSC 22 in support.

[50] Fixing a non-parole period in a sentence is statutorily governed under the SP Act. Section 18 of the SP Act, as it stood until recently, is to the following effect:

Section18-

(1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the ***court must fix a period during which the offender is not eligible to be released on parole.***

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.

(6) In order to give better effect to any system of parole implemented under a law-making provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.

(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6).
(emphasis added)

[51] Provisions, as contained in Section 18 (2) of the SP Act, does not impose an absolute discretion in a sentencing judge not to impose a non-parole period. Conversely, the exercise of the discretion under Section 18 (2) depends on the nature of the offence or the past history of the offender; and, the court must conscientiously consider that the imposition of a non-parole period was appropriate. Having regard to the nature of the offence, the manner of offending and the trans-boundary ramifications in illicit-drug related offences, I am of the

view that the learned judge was quite conscious in his disinclination to act under Section 18 (2) of the SP Act. In my view, the learned judge was right in imposing a non-parole period in terms of Section 18 (1) of the SP Act after taking into consideration factors surrounding the offending.

[52] I have considered the judgment of the Supreme Court of Fiji in *Timo*'s case (supra) that lucidly explains matters relating to the application of Section 18 of the SP Act with specific reference to its statutory content in relation to the exercise of the discretion under sub-section (2). I am of the considered view, based on the reasoning of the learned sentencing judge, that the case at hand did not fall within such a category of cases where '*the nature of the offence*' could have attracted the discretion of the learned judge to be exercised in appellant's favour and refrain from imposing a non-parole period. This court does not find it difficult to come to that conclusion having regard to the reasons given by the learned judge in imposing the overall sentence with a non-parole period of twelve years.

[53] On the contrary, the learned sentencing judge ought to have, as he in fact had, given effect to the provisions of Section 4 of the SP Act and balanced the deterrent effect of the sentence against to the rehabilitation of the appellant when he had imposed only a term of twelve year period of imprisonment when Section 5 (a) of the Illicit Drugs Control Act had stipulated a mandatory imprisonment for life.

[54] Before I part on this point, it would be appropriate to refer to the judgment of the Supreme Court of Fiji in the case **Nadan v State** [2019] FJSC 29: CAV0007.2019 (31 October 2019), where it was observed the following:

> [43] … *the requirement to fix a non-parole period is mandatory where the head sentence is life imprisonment or two years imprisonment or more, unless the nature of the offence or the past history of the offender justifies a different course being taken. In that event, the court may decline to fix a non-parole period: see sections 18(1) and 18(2) of the Sentencing and Penalties Act 2009.*
>
> [44] *This requirement was recently considered by the Supreme Court in Timo v The State [2019] FJSC 22. Gates J at para 11 said that the question whether the nature of the offence or the past history of*

> *the offender should result in the court declining to fix a non-parole period had to be "specifically addressed" by the sentencing judge. As for the nature of the offence, he said at para 10 that a "less serious form of the offence may lead to a less severe approach and thus a decision by the court not to order a longer term to be served closer to the head sentence". And as for the past history of the offender, he said that "a person with a previous good character or with minor prior offending may be an appropriate candidate to be allowed the benefits of the one third remission[10] alone without an order for a period of ineligibility for parole". However, Lokur J went considerably further. He said at paras 36 and 37 that the power to fix a non-parole period should only be exercised in "exceptional cases and circumstances". He was saying, in effect, that not fixing a non-parole period should be the norm, and only exceptionally should one be fixed. On the face of it, that approach does not sit well with the statutory language*.

[55] This court extensively dealt with the application of the provisions of Section 18 of the SP Act in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (03 October 2019), the reasoning of which, are more in line with the above observations of the Supreme Court in **Nadan**'s (supra) case.

[56] Be that as it may, I note that Section 18 (2) of the SP Act, however, now stands repealed with the enactment of the Act No 29 of 2019, by which the Corrections Service Act, 2006 was amended. Section 3 of that amendment makes provisions for the repeal of Section 18 (2) of the SP Act resulting in the mandatory imposition of a non-parole period in the relevant category of cases to which the case at hand belonged.

[57] For the above reasons, I do not see any factual or legal basis in ground (2) urged in support of his application for leave to appeal. I, accordingly, reject it.

Ground Three

[58] The appellant, in his third ground, seeks to raise an issue on the basis that the learned judge had erred by fixing the non-parole period too close to the head sentence. The complaint of the appellant is that he had no space for any hope of rehabilitation or incentive for good behaviour whilst in prison. The appellant

relies on Section 4 (1) of the SP Act and Section 27 (1) of the Corrections Service Act, 2006 (CS Act).

[59] The provisions of Section 4 of the SP Act have been broadly couched in such a manner to achieve the ultimate objectives of deterrence for the offence and the rehabilitation-based integration of the offender into the community ensuring the community's eventual safety and well-being. Section 4 of the SP Act states:

Sentencing Guidelines

4. — (1) The only purposes for which sentencing may be imposed by a court are:
(a) to punish offenders to an extent and in a manner, which is just in all the circumstances;
(b) to protect the community from offenders;
(c) to deter offenders or other persons from committing offences of the same or similar nature;
(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;
(e) to signify that the court and the community denounce the commission of such offences; or
(f) any combination of these purposes.

(2) In sentencing offenders, a court must have regard to:
(a) the maximum penalty prescribed for the offence;
(b) current sentencing practice and the terms of any applicable guideline judgment;
(c) the nature and gravity of the particular offence;

(d) the offender's culpability and degree of responsibility for the offence;
(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;
(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;
(i) the offender's previous character;
(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and
(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[60] I have considered the judgments of the contemporary jurisdictions as relied on by the appellant in his submissions dated 09 October 2019 in support of the third ground of appeal. They traverse the principles on the need to ensure the liberty of a prisoner at the earliest possible occasion while focussing on the overall objectives of the sentencing, which are compatible with the statutory provisions, as enumerated in Section 4 of the SP Act. The relevant provisions of the Corrections Services Act, too, do not have inefficacious effect of nullifying the overall objectives of sentencing.

[61] The legal position in Fiji has been aptly expounded in the case of ***Tora v State*** AAU 0063 of 2011; 27 February 2015 [2015] FJCA 20 by the Court of Appeal of Fiji. It was held that:

> *The purpose of fixing the non-parole term is to fix the minimum term that the appellant is required to serve being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what 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 term should not be so close to the head sentence as to deny 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. It must also be recalled that the current practice of the Corrections Department,* ***in the absence of a Parole Board****, is to calculate the one third remission that a prisoner may be entitled to under section 27(2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.*

[62] I am of the view that the head sentence and the non-parole period are optimally positioned to ensure the overall objective of sentencing when one considers that the statutory mandate under Section 5 (a) of the Illicit Drugs Control Act was to impose a term of life imprisonment for the offence that the appellant stands convicted. The appellant, who is approaching the age of 34 years having born on 16 April 1986, is well-accommodated for rehabilitation after serving the non-parole period of twelve years after absorbing the deterrence for the offence he had committed.

[63] For the above reasons, I see no merit in the third ground urged in support of the application for enlargement of time for leave to appeal. Accordingly, I reject it.

[64] This court, with the hope of ensuring justice to the appellant, *ex mero motu* considered whether the learned judge had (i) acted upon on any other wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him; (iii) mistaken facts; or (iv) failed to take into consideration any other relevant matters (***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 13) justifying the intervention by this court in the matter of the sentence after granting leave to appeal on an enlarged time. This court found none.

[65] In the circumstances, I find that there is no basis to consider any of the three grounds urged in support of the application or any other reason for the grant of enlargement of time for leave to appeal. The application is, accordingly, dismissed.

[66] Accordingly, the orders of court are:

(i) Enlargement of time for leave to appeal against the sentence is refused; and,

(ii) Sentence imposed on the appellant by the High Court shall stand.

Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL