IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 11 of 2015
[Court of Appeal No. AAU 63 of 2011]

BETWEEN	:	PAULA TORA
		Petitioner
AND	:	THE STATE
		Respondent
Coram	:	The Hon. Justice Saleem Marsoof, Justice of the Supreme Court The Hon. Justice Brian Keith, Justice of the Supreme Court The Hon. Justice Priyasath Dep, Justice of the Supreme Court
Counsel	:	Mr. S. Waqainabete for the Petitioner Mr. M. Korovou for the Respondent
Date of Hearing	:	12 October 2015
Date of Judgment:		22 October 2015

JUDGMENT

Hon. Saleem Marsoof, JA

[1] The only question that arises for decision on this application for special leave to appeal is whether the non-parole term of six years on a primary sentence of eight years imprisonment imposed on the petitioner for aggravated robbery, ought to be further reduced to facilitate rehabilitation of the petitioner and remission of his sentence.

[2] Charged with the offence of aggravated robbery alleged to have been committed on 11th November 2010 and punishable under section 311(1)(b) of the Crimes Decree No. 44 of 2009, the petitioner had pleaded guilty to the charge and was sentenced on 31st January 2011 by the High Court at Lautoka to eight years imprisonment with a non-parole term of seven years in prison.

[3] At the time of the incident that led to the prosecution of the petitioner, he was 32 years old and self-employed as a grass cutter. On 11 November 2010, the victim Pochaia Naidu, who was a bus driver employed by the Pacific Transport Ltd, was assigned to drive Natabua route in Lautoka. At around 11 am, the petitioner got on the bus and when the victim stretched out his hand for the bus fare, he pushed his hand away. The victim got suspicious and pulled the till containing cash towards himself. At this point, the petitioner struck the victim's hand with the blunt side of a chopper and hit the victim's head with his hand. The petitioner grabbed the till containing $150.00 cash and ran away.

[4] Since the petitioner had pleaded guilty to the charge of aggravated robbery, the High Court had only to rule on the sentence after hearing submissions of the petitioner and the learned counsel for the respondent. The learned High Court Judge, in his ruling on sentence dated 31st January 2011, observed that the offence of 'aggravated robbery' is identical in its content to the offence of 'robbery with violence' under the Penal Code, Cap 17, and that while the latter was punishable with a term of life imprisonment, the former is punishable with a 20 year term of imprisonment. He also noted that the offence of 'aggravated robbery' is exclusively triable by the High Court, which shows that the offence is treated both under the Crimes Decree and the Penal Code as a very serious offence.

[5] After carefully examining the provisions of the Sentencing and Penalties Decree, 2009, in particular, section 15 of the said Decree, in the context of relevant aggravating and mitigating factors, the petitioner's societal background and time spent by him in remand, the learned High Court Judge imposed a sentence of eight years imprisonment, the correctness of which is not challenged by the petitioner in his application for special leave to appeal.

[6] In his application for special leave to appeal, the petitioner only contends that the non-parole term of 7 years imprisonment, which was reduced on appeal by the Court of Appeal to 6 years in prison, should be further reduced to facilitate rehabilitation and early remission. In this context, it is important to note that in fixing the non-parole term at seven years, the learned High Court Judge observed in his Sentence Ruling that-

> "17. You have had fourteen previous convictions from 15.07.1997 – 19.03.2008. I will, however, consider only the convictions entered against you in 2008, which are five in total. These convictions were for similar offences of burglary and larceny in respect of some of which suspended terms have been imposed.
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> 18. In view of the foregoing, I act under Section 18(1) of the Decree and order that you shall not be eligible for parole until you serve a term of 7 years in imprisonment. The sentence is to be treated as having been effected from 19th January, 2010, the date on which you tendered your plea of guilty."

[7] It is significant to note that Lecamwasam JA who delivered the main judgment of the Court of Appeal dismissing the appeal but reducing the non-parole term to 6 years, and Basnayake JA, who agreed with his reasons and conclusions, did not set out any reason for bringing down the non-parole term to 6 years in prison, but Justice Calanchini P. in his concurring judgment observed that-

> "[2] The purpose of fixing the non-parole term is to fix the 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 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 purposes 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.

[3] In my view the non-parole term of seven years on a head sentence of 8 years does not promote or facilitate conditions which might assist the rehabilitation of the Appellant. I note that the previous criminal history of the Appellant may lead to the conclusion that the prospect of rehabilitation is unlikely. However even a prisoner with the Appellant's record should not be deprived or denied the chance or the opportunity to rehabilitate himself or to be rehabilitated. Although relatively long as a ratio of the head sentence, a non-parole term of six years represents a balance between rehabilitation and deterrence in this case."

[8] This Court is not called upon in this case, to rule on the correctness of the current practice adopted by the Corrections Department in computing the one third remission a prisoner may be entitled to under section 27(2) of the Corrections Service Act 2006, and I do believe that Justice Calanchini P in the above quoted passages only took note of that practice without in anyway intending to endorse the same as correct in law.

[9] On a plain reading of section 27 of the Corrections Service Act, it appears clear to me that what is intended by sub-section (2) of that section is to determine for "the purpose of the initial classification", a date of release for each prisoner, which necessarily has to be computed on the entirety of the principal sentence imposed by court, which will then be adjusted, as provided in section 28(1) of the Corrections Service Act, dependent on the good behaviour of the prisoner.

[10] The contention of the petitioner in this application for special leave to appeal is that the non-parole term as varied by the Court of Appeal is too close to the head sentence as to deny or discourage the possibility of the petitioner's rehabilitation. The petitioner has submitted that he has already gone through many rehabilitation courses and programmes in prison and he is now awaiting job placement, and that these developments have enhanced his prospect of integrating into the community. He submits that if his non-parole term is reduced by another year, that will facilitate his eventual restoration to society as a better human being.

[11] Mr. Korovou, who appears for the respondent, has strongly objected to the grant of special leave to appeal in this case, and has submitted that if a further one year reduction of the current non-parole period is allowed, the petitioner will become entitled to be released even before he serves the mandatory two-thirds of his primary sentence of 8 years, which will be completed only upon the petitioner serving a period of 5 years and 4 months in prison. He submitted that this would be inconsistent with section 27 of the Corrections Service Act, as well as section 18 of the Sentencing and Penalties Decree 2009. Mr. Korovou has invited the attention of court to section 18(4) of the Sentencing and Penalties Decree, which provides that any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

[12] In terms of section 18(1) of the Sentencing and Penalties Decree, a court which sentences an accused for a term of imprisonment exceeding two years, must fix a period during which the offender is not eligible to be released on parole, unless considering the nature of the offence or the past history of the offender, it considers fixing a non-parole period inappropriate. In fixing a non-parole period, the sentencing court must be mindful of the provisions of section 27 of the Corrections Service Act so as to avoid any conflict.

[13] In *Maturino Raogo v State* Criminal Appeal CAV 003 of 2010 (19th August 2010) in which this Court had the opportunity of considering a possible conflict between section 33 of the Penal Code, Cap. 17, as amended in 2003 and section 63(1) of the Prisons Act, Cap. 86, which were applicable in that case, and observed as follows:-

> "[23] It should be noted that the primary sentence directed to the Prison Service by warrant from the Court remains the sentence of the Court. If there is one offence only that does not involve either concurrency or totality. If the Court is sentencing in respect of a number of offences and/or the prisoner is already serving a sentence or sentences for antecedent convictions, the Court's main task is to reach the appropriate figure for totality and to apply any relevant rules relating to concurrency.
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> [24] It follows that the sentencing Court can only fix a minimum term of imprisonment equal to or less than the primary sentence of the court based on the considerations stated in the last paragraph. *It also follows that the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than the two thirds*

> *of the primary sentence of the Court.* It will be wholly ineffective if a minimum sentence finishes prior to the earliest release date if full remission of one third is earned. Experience shows that one third remission is earned in most cases of those sentenced to imprisonment." (*Emphasis added*)

[13] It is of course relevant to note that the concept of "minimum term" has now been subsumed in the concept of a "non-parole period" under the Sentencing and Penalties Decree, 2009, but the principles discussed above remain the same and are useful in deciding this case. I can do no better than repeat what was said by this Court in paragraph [30] of its judgment in *Raogo's* case,

> "[30] In any exercise of statutory interpretation the task for the Court is to ascertain the intention of the legislature. In the present case it is clear from the express words used and from the legal framework existing at the time the 2003 amendment to section 33 was enacted, that the legislature wished to provide a power in the sentencing court to ensure that in appropriate serious cases a greater proportion of the primary sentence would actually be served in prison with the consequence that there would be less than one third remission granted. So where imposed, the minimum sentence [or under the present legislation, the non-parole period] that is fixed is an ancillary addition to the primary sentence which is intended to override remission on the primary sentence. *The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences.*" (*Emphasis added*)

[14] I am of the opinion that the petitioner has failed to show that in all the circumstances of this case, the impugned judgment of the Court of Appeal has occasioned any substantial and grave injustice to the Petitioner or otherwise given rise to a question of general legal importance or substantial question of principle affecting the administration of criminal justice as contemplated by section 7(2) of the Supreme Court Act No. 14 of 1998.

[15] For these reasons, and in all the circumstances of this case, I am of the opinion that there is no basis for the grant of special leave to appeal, and in consequence, special leave to appeal has to be refused.

Hon. Brian Keith, JA

[16] I agree that special grant of leave to appeal should be refused for the reasons given by Marsoof JA.

Hon. Priyasath Dep, JA

[17] I have read the judgment in draft of Marsoof JA and I agree with his reasons and conclusions.

Order of Court

[18] Accordingly, this Court makes order refusing special leave to appeal.

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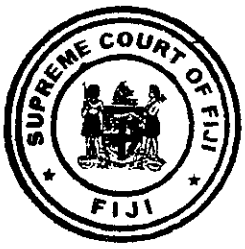
Hon. Justice Saleem Marsoof
JUSTICE OF THE SUPREME COURT



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Hon. Justice Brian Keith
JUSTICE OF THE SUPREME COURT

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Hon. Justice Priyasath Dep
JUSTICE OF THE SUPREME COURT

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