IN THE SUPREME COURT OF FIJI
[APELLATE CRIMINAL JURISDICTION]

CRIMINAL PETITION NO. CAV 0017/2016
[On Appeal from Court of Appeal No.AAU 0012 of 2015]

BETWEEN : **PRANIL SHARMA**

PETITIONER

AND : **THE STATE**

RESPONDENT

CORAM : **Hon. Justice Sathyaa Hettige, Justice of the Supreme Court**
Hon. Justice Suresh Chandra, Justice of the Supreme Court
Hon. Justice Almeida Guneratne, Justice of the Supreme Court

COUNSEL : **Petitioner in Person**

Mr. L. J. Burney with Ms S.Tivao for the Respondent

Date of Hearing : **14 June 2016**

Date of the Judgment: **22 June 2016**

JUDGMENT OF THE COURT

Hettige J

[1] I agree with the reasoning and conclusion in the Judgment of Justice Almeida Guneratne.

Chandra J

[2] I agree with the reasoning and conclusion in the judgment of Justice Almeida Guneratne.

Almeida Guneratne J:

Introduction

[3] This is an application for special leave appeal against the single Judge ruling of the Court of Appeal (referred to as the Court) dated 23rd December, 2015. By that ruling the Appellant's leave to appeal application against the sentence of imprisonment imposed by the Nadi Magistrate's Court exercising an extended Jurisdiction was refused and the Appeal dismissed in terms of Section 35(2) of the Court of Appeal Act (Cap 12) on the basis that the Appeal was 'frivolous'.

[4] Although the said application of the Appellant in the Court of Appeal was out of time by more than 4 months the court accepted the Appellant's explanation for the delay and proceeded to hear the matter of the appeal which it eventually dismissed on the basis that it was 'frivolous' as stated above.

Brief Narration of the Background Facts.

[5] The Appellant had pleaded guilty to two counts of aggravated robbery as envisaged in Section 311(1)(b) of the crimes Decree No.44 of 2009. He was sentenced for a term of 3 years 11months imprisonment with a non-parole period for 3 years.

[6] As revealed from the ruling of the Court the Appellant had attempted to Canvass against the conviction as well, notwithstanding his plea of guilty in the Magistrate's Court. However, that being pointed out by the Justices of Appeal the Appellant, who had appeared in Person had confined submissions to the sentence issue (vide: paragraph [1] of the Court of Appeal Ruling].

The broad grounds urged against the Sentence imposed

[7] The appellant sought to re-agitate the matter relating to the conviction before this Court as well. On being pointed out by us that, the sentence imposed had a direct bearing on the plea of guilty and that, therefore the Appellant cannot be permitted to have it both ways, the Appellant settled to address on the issue as regards the sentence (though reluctantly). We also impressed upon the Appellant that it was not possible for us to respond to the complaints sought to be made against the treatment the Legal Aid Commission is alleged to have meted out.

[8] The sentence so imposed by the Magistrate's Court had been put in issue before the single Justice of Appeal on the following broad grounds viz: that,

a) There was disparity in the sentence,
b) Wrong guideline judgments had been followed,
c) The wrong starting point had been used resulting in a flawed tariff employed,
d) The sentence imposed was manifestly excessive and;
e) The non- parole period was manifestly excessive.

[9] The same grounds were re-canvassed before this court.

The Reasoning and conclusion of the Single Judge of the Court of Appeal.

[10] The Court dealt with all those grounds as follows:

Re: (a) Disparity of Sentence and (b) the wrong guideline Judgments had been followed.

[11] As revealed from the Record and the Ruling there had been a Co- offender involved with the Appellant in the Commission of the Crime in question. He had never been

arrested or charged. Accordingly, the Court had held that there was no basis to apply "the disparity principle".

[12] I cannot see any error and/or misdirection whether in fact in law in that finding. There were no guideline judgments either to go by.

Re : that, the wrong starting point had been used resulting in a flawed tariff being employed

[13] In the written submission dated 30th May, 2016, the Appellant had expressed grievance which I reproduce below for purpose of easy reference and reflection thereon.

Sentence Appeal Submissions

> *"Submission on the special leave to appeal application dated 10th November 2015 which received by Court of Appeal on 4th December, 2015. Appeal on AAU0012 of 2015 according to Supreme Court record on page 7. Calculation of due remission in prison head sentence minus non-parole equals term to be remission 3 years 11 months minus 3 years equals 11 (1/3) equals 3 months 20 days that is wrong calculation from the current prison system which is unlawful".*

[14] In that submission the Appellant concedes that, "(the) Head Sentence (is) ok".

[15] Then, what is the basis on which the Appellant could challenge the same on the grounds that, the wrong starting point had been used resulting in a flawed tariff being employed?

[16] Moreover, where was the error in the sentencing discretion as exercised by the Magistrate's Court? (as per the decision in **Sharma v State** (Crim. App. No. AAU

0065 of 2012, 2nd June 2014 which the Court in its ruling referred to? (vide: at paragraph [4] thereof).

[17] The court proceeded to state thus:

> *"The maximum penalty prescribed for aggravated robbery is 20 years imprisonment. When the appellant committed the robbery in 2012, the applicable tariff for the offence was between 8-14 years' imprisonment (**Bonaseva v State** [2015] FJSC 12). The learned Magistrate used the lower end of the tariff (8 years) and then adjusted the sentence to reflect the mitigating and aggravating factors. The learned Magistrate gave generous discount for the appellant's guilty plea and previous good character".*

[18] What could this Court add to that Judicial exposition? I cannot add any.

Re: That the sentence imposed was manifestly excessive

[19] For the same reasons adduced above, I hold that this ground also cannot be sustained. More-over, the sentence, if at all was lenient, the guilty plea obviously having achieved that benefit.

Re: The Non-Parole period was manifestly excessive

[20] This is the only ground that struck me as deserving some consideration. I say this for the following reasons viz:

(a) True, on account of the plea of guilty that a (Head) sentence of 3 years and 11 months had been imposed which I noted earlier the Appellant having conceded it to be "OK".

(b) Be that as it may, was a non-parole period of 3 years justified given the fact that the "Head Sentence" was for 3 years and 11 months?

Reasons adduced by the Appellant in that Context

[21] Reasons for non-parole.

> *"Non parole period not to be imposed because it is optional under Section 18(2) of the Sentencing and Penalty Decree. Court to give reasons on nature of offence. Co-accused deported. Petitioner (accused) acted under duress, during offending past history of offender. Forced into sex labour due to poverty, twenty one (21) years at the time. No employment."*

[22] The Appellant's grievance in that context hinges on Section 18(2) of the Sentencing and Penalties Decree, 2009 (SPD) which reads thus:

> *"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)"*

[23] Needless to say, the use of the word 'may' vests discretion in the particular court to impose an appropriate sentence. There is no basis for me to interpret the word 'may' to read as otherwise for this is the prevalent law in Fiji in so far as the concept of sentencing is concerned.

[24] However, the antecedent provisions to Section 18(2) as well as the subsequent provisions thereto must be looked at.

> *"Section 18(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".*

[25] Here again, given the fact that, the Magistrate's court sentenced the appellant for 3 years 11months, the fixing of the non-parole period of 3 years *prima facie* was in good order.

[26] "Section 18(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."

[27] On the application of that provision to the facts of this case, it would be seen that the same has no application.

[28] "Section 18(4): Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence" (which must be construed as the "Head Sentence)".

What was the term of the sentence?

[29] It was for 3 years 11 months.

What was the fixed non-parole period?

[30] It was for 3 years.

[31] By simple arithmetic, the non-parole period fixed was less than the Head Sentence as envisaged in Section 18(4).

[32] Consequently, as Mr. Burney for the State contended that, the Complaint that the Appellant had been subjected to gender discrimination and duress has no bearing on the conviction as well as the head sentence. In so far as the conviction was concerned, (on the basis that it had been in the nature of an "equivocal plea") it carried no merit. The Appellant's own conduct did not permit the conviction to be put in issue, (a fact which the single Judge of the Court of Appeal had noted).

[33] As regards the "Head Sentence" the Appellant has conceded that it is 'ok' (vide: the written submission) Thus, only the fixing of the Non- Parole Period remained to be considered, if at all, before this Court. For the reasons given earlier the said period so

fixed in the context of Section 18 of the SPD was perfectly lawful and both the trial judge as well as the Single judge did not err in principle or on the law.

[34] However, some matters of concern remain for reflection in regard to the fixing of non-parole periods.

Should not the Court be required to give reasons for fixing a particular or specific period for non-parole?

[35] How does a Judge fix a non-parole period within the discretion available to him in the context of Section 18(1) read with 18(4)? The offence in question having fallen within Section 18(1) of the SPD, while the fixing of a "non-parole period" became mandatory, a reading of the section shows that in decreeing a specific period, the Section is silent as regards the fixing of a specific period. Should not the Judge be required to give reasons as to why period 'X' and not period 'Y' or 'Z' was fixed?

Our Courts in Fiji are Statutory Creatures and Not Common Law Courts as that phrase is understood in English Jurisprudence

[36] For that reason, though, being the highest Court of this land, this Court cannot supply any omission of the legislature regarding the same as being concomitant to the concept of natural justice. As Professor Wade's monumental work on Administrative Law notes, even the English Courts have "not yet" made that advance, particularly where discretion is vested in a Court of Law. (see pages 440 to 446 (Wade, 11th Ed.)

Initiatives taken by the Fijian Appellate Courts in that regard-remain *in Vacuo*

[37] In the result, what ever initiatives our own courts in Fiji have taken or expressed views on remains *in vacuo*. (see: the single judge decision of the Court of Appeal in **Kilioni Naitini and 2 Others v The State**; AAU 102 of 2010, 28 May, 2015 per Suresh Chandra, JA and this Court's decision in **Bogidrau v State** [2016] FJSC 5, 21 April, 2016).

Need of the Hour

[38] Perhaps a practice direction setting out some guidelines on the exercise of discretion in fixing periods of non-parole appears to be the need of the hour. This I say having regard to constraints of time the Supreme Legislature of the Country is faced with.

The force of an appropriate Practice Direction

[39] The force of a practice direction by the Chief Justice, who is also the President of the High Court in terms of the Constitution, could fill that 'hiatus' in regard to the gap period between a 'head sentence' and the non parole period. That would apply to a Magistrate's court exercising extended jurisdiction as well. Practice Directions issued by His Lordship the Chief Justice have assumed the force of law in Fiji. To cite one illustration, this is seen in the practice direction issued in the context of the judicial calendar for computing time limits in filing appeals from decisions of the High Court.

Has the Appellant overcome the threshold tests in seeking special leave to Appeal?

[40] Having said all that now I turn to the crunch factor. On the facts and the applicable legal principles in this case the Appellant has failed to satisfy any of the threshold tests decreed in Section 7(2) (a), (b) and (c) of the Supreme Court Act of 1998 for the reasons I have adduced earlier.

Was the Appeal liable to have been dismissed by a single Justice of Appeal in terms of Section 35(2) of the Court of Appeal Act (Cap 12)?

[41] The Single Justice of Appeal dismissed the Appeal in terms of Section 35(2) of the Court of Appeal Act holding that the Appeal was 'frivolous'.

[42] It is to be noted that the terms 'vexatious' and 'frivolous' are used in the disjunctive in that section. This is probably why the Honourable Justice made reference only to the appeal being 'frivolous' which I found to be fully justified in the facts and circumstances of this case as recounted above in the light of precedents *interalia* such as **R v Taylor** [1979] Crim.L.R.649, **Exp. Forest Health District Council**, The Times, May 16, 1997, and the decision of this Court in **Bogidrau v State**; [2016] FJSC 5; CAV 0031, 2015, 21 April 2016.

Conclusion

[43] For the aforesaid reasons, in terms of Section 7(1) (a) of the Supreme Court Act I refuse to grant special leave to appeal against the decision of the single Justice of Appeal dated 23rd December, 2015.

Order of the Court

1. *The Appellant's application for special leave to appeal is refused.*

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Hon. Justice Sathyaa Hettige
Justice of the Supreme Court

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Hon. Justice Suresh Chandra
Justice of the Supreme Court

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Hon. Justice Almeida Guneratne
Justice of the Supreme Court