IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No. CAV 0031 of 2015
(Court of Appeal No. AAU 126/2014)

BETWEEN : **ILAISA BOGIDRAU**

PETITIONER

AND : **THE STATE**

RESPONDENT

CORAM : **Hon. Mr. Justice Saleem Marsoof, Justice of the Supreme Court**
Hon. Mr. Justice Brian Keith, Justice of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Justice of the Supreme Court

COUNSEL : **Mr. S. Waqainabete for the Petitioner**
Ms. J. Prasad for the Respondent

Date of Hearing: **13 April 2016**

Date of Judgment: **22 April 2016**

JUDGMENT OF THE COURT

Marsoof, J

I have read a draft of Keith J's judgment, and I agree with his reasoning and conclusion.

Keith, J

Introduction

1. Many appeals against sentence relate to the fixing of a non-parole period. This is another one. The single judge in the Court of Appeal did not think that the appeal was arguable. He therefore dismissed the appeal under section 35(2) of the Court of Appeal Act. The petitioner now applies to the Supreme Court for special leave to appeal. He is Ilaisa Bogidrau, and I trust that he will forgive me if from now on I refer to him by his family name for convenience.

The facts

2. In the light of the issue which Bogidrau's appeal raises, it is unnecessary to set out the facts in any detail. Bogidrau worked as a cleaner at a night club in Suva. He arranged for the night club's accountant to be robbed by his two accomplices. On the morning of the robbery, 17 February 2014, he let his accomplices know that the accountant had arrived for work. They came to the night club and Bogidrau let them tie him up. They then called out to the accountant who was in her office. When she opened the door, she was threatened with a chopper which was placed against her neck. She was ordered to open the safe which she did, and she was then tied to a chair and gagged. Cash amounting to $14,000 was taken, as well as her laptop and mobile phone.

The sentence

3. Bogidrau was charged with aggravated robbery. He pleaded guilty. The court took 9 years imprisonment as its starting point. It added 2 years for what it thought were the aggravating factors, and then deducted 3 years for the plea of guilty, a further year for Bogidrau's personal mitigation and a further 6 months for the time he had spent in custody on remand. That resulted in a term of 6 years and 6 months imprisonment (colloquially called "the head sentence"). In addition the court fixed a non-parole period

in his case of 5 years. The only ground of appeal which the Court of Appeal was asked to consider was that there was an insufficient gap between the head sentence and the non-parole period. In those circumstances, I should say something about the regime for fixing a minimum period which an offender has to serve.

The non-parole period

4. Section 18 of the Sentencing and Penalties Decree provides for the fixing of a non-parole period. Unless the nature of the offence or the past history of the offender make the fixing of a non-parole period inappropriate, the court sentencing an offender to imprisonment for life or for a term of two years or more must fix a non-parole period during which the offender may not be released. The non-parole period was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission. At present there is no mechanism in place to enable prisoners to be released on parole: a parole board, or an equivalent body, has not yet been created. That means that the only route by which an offender can currently be released before the expiry of his head sentence is by the operation of the current practice relating to remission.

5. That explains why in ***Tora v The State*** [2015] FJSC 23, the Supreme Court held at [13] that what had been said by the Supreme Court in ***Raogo v The State*** (CAV 003 of 2010, 19 August 2010) about the provision in the Penal Code which enabled the court to fix a minimum period which the prisoner had to serve applied with equal force to the new regime in section 18 of the Sentencing and Penalties Decree. In ***Raogo***, the Supreme Court had said at [30]:

> *"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."*

6. Section 18(4) of the Sentencing and Penalties Decree provided that the non-parole period had to be at least 6 months less than the head sentence, and a number of authorities have addressed how long the non-parole period should be, subject, of course, to that provision. Two principles can be identified:

> (i) *"[T]he non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent": per Calanchini P in* ***Tora v The State*** *[2015] FJCA 20 at [2].*
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> (ii) *"[T]he sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than 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":* ***Raogo****, op cit, at [24].*

7. These principles show why Bogidrau's original ground of appeal could not succeed. Even without the non-parole period, Bogidrau could not have been released on the remission of the remainder of his sentence until he had served 4 years and 4 months. That left only 8 months until the expiry of the non-parole period. If the non-parole period was reduced from 5 years, the gap between the time when he would have been eligible for early release on the remission of the remainder of his sentence and the expiry of the non-parole period would be so short as to frustrate what the Supreme Court said in ***Tora*** was the legislative intention behind the court's obligation to fix a non-parole period.

8. This was realistically accepted by Bogidrau's counsel, Mr. S. Waqainabete, on the hearing of the application for special leave to appeal, and he acknowledged that he could not advance any arguments in support of the original ground of appeal.

The problem with remission

9. That brings me to Bogidrau's new ground of appeal. It did not find its way into his petition. It was raised for the first time in his written submissions in support of his petition. It relates to how the Commissioner of Prisons calculates the remission in the case of a prisoner who had a non-parole period fixed in his case. To explain that, I need to say something about remission itself.

10. Prisoners are classified when they enter the prison system. The classification is based on the date when they will be released. But how is that date to be calculated? Section 27(2) of the Prisons and Corrections Act 2006 provides the answer:

> *"For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month."*

That is the only place, so far as I can tell, where remission of one-third of the sentence is mentioned. So remission of one-third of the sentence is not expressed as a right which prisoners enjoy. It is simply used as the basis on which to calculate what a prisoner's release date is for the purposes of classification. As it is, the Commissioner's practice is to remit the remainder of a prisoner's sentence once the prisoner has served two-thirds of it, though that is dependent on how the prisoner has behaved in prison. As section 28(1) of the Prisons and Corrections Act provides:

> *"The remission of sentence that is applied at the initial classification shall thereafter be dependent on the good behaviour of the prisoner, and it may be forfeited and then restored, in accordance with Commissioners Orders."*

11. The fact that the remission of the remainder of a prisoner's sentence is not expressed as a right was acknowledged by the Supreme Court in ***Kean v The State*** [2015] FJSC 27 at

[42]. Having referred to sections 27(2) and 28(1) of the Prisons and Corrections Act, the court said at [42]:

> *"If [the prisoner] was of 'good behaviour' while in prison, he might expect to have one-third of his sentence remitted, but in the light of the way the sections have been drafted, it looks as if [a prisoner] does not have the legal right to have any part of his sentence remitted. Whether he might have a legitimate expectation that one-third of his sentence would be remitted if he was of 'good behaviour' while in prison is another matter."*

What this means is that the calculation of remission is dependent on the practice which the Commissioner has adopted, though as I have said, the Commissioner's practice is to remit one-third of the prisoner's sentence if the prisoner has been of "good behaviour" while in prison.

12. The problem arises when one comes to a prisoner who had a non-parole period fixed in his case. One might have expected that the Commissioner's practice would have been to release the prisoner (provided that he has been of "good behaviour") either once he has served two-thirds of his sentence or on the expiry of the non-parole period, whichever is the later. On that footing, Bogidrau would be released after he has served 5 years (subject to him having been of "good behaviour"). However, the Commissioner's current practice is otherwise. The prisoner will only be released (provided that he has been of "good behaviour") once he has served two-thirds of the difference between the head sentence and the non-parole period. The Supreme Court took judicial notice of that in ***Kean*** at [46]. On that footing, even if Bogidrau is of "good behaviour", he will not be released until he has served 6 years. Bogidrau's new ground of appeal is that this is unjust.

13. A not dissimilar argument was advanced in ***Kean***. But it had an important difference. Kean had been sentenced before the promulgation of the Sentencing and Penalties Decree, and therefore before the court was required to fix a non-parole period in serious

cases. By the time his case arrived at the Court of Appeal, the Sentencing and Penalties Decree had been promulgated, and the non-parole period in his case was fixed by the Court of Appeal. It was argued on Kean's behalf that this infringed his rights under the 2013 Constitution which had come into force by then – specifically his right under section 14(2)(n) which provides, in the section dealing with the rights of accused persons:

> *"(2) Every person charged with an offence has the right – ...*
> *(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing ..."*

14. The Supreme Court did not accept this argument. What made Kean's sentence more "severe" was not "the prescribed punishment" for his offence, but how the grant of remission worked in practice. The same applies here. If it is unfair for Bogidrau to serve 6 years rather than 5 before he is eligible for early release, that is not the consequence of the length of the non-parole period which was fixed in his case. It is the consequence of the Commissioner's current methodology for calculating remission in such cases. As was said in ***Kean*** at [47]:

> *"There may be good reasons for saying that the way in which the Commissioner calculates remission in cases in which a non-parole period has been fixed is questionable. Indeed, many people might say that it would be desirable for a prisoner to make an application for judicial review of the current practice to enable the court to pronounce on its legality. But it is not the prescribed punishment for the offence which has the effect of making the sentence which the Court of Appeal substituted for that of the trial judge more severe than the one which the trial judge passed. It is how the Commissioner calculates remission in cases where a non-parole period has been fixed."*

15. I repeat what I said earlier lest the emphasis I wish to convey is lost. One might have expected the Commissioner's practice to have been to release the prisoner either when he has served two-thirds of his sentence or on the expiry of the non-parole period,

whichever is the later. That would reflect both the desirability of encouraging the prisoner's rehabilitation if he has behaved while in prison, as well as the need to reflect the sentencing judge's view of the length of time that the prisoner should actually serve. Many people might say that the Commissioner's current practice does neither. I encourage the Commissioner to review his practice in the light of this judgment. If he maintains his current practice, a prisoner in Bogidrau's position may well want to make an application for judicial review of the Commissioner's practice to enable the court to pronounce on its legality. In that event, it would be desirable for the Legal Aid Commission to grant legal aid to any prisoner who wishes to pursue such an application. If such an application is lodged, I would encourage the High Court to order a speedy hearing of the application, because all prisoners who have had a non-parole period fixed in their case are affected by the Commissioner's current practice.

16. Mr. Waqainabete asked us to decide the matter for ourselves – perhaps by using the court's power under section 6 of the Sentencing and Penalties Decree to give a guideline judgment. For my part, I do not believe that to be possible. A guideline judgment is intended to give guidance to magistrates and judges when they pass sentence. The problem in this case is not how magistrates and judges fix the non-parole period. It is how the Commissioner calculates remission in such cases. In any event, if we proposed to pronounce on the legality of the Commissioner's practice, the Commissioner would have to be notified of that and given an opportunity to make submissions to the court.

Conclusion

17. Although the issue which Bogidrau's new ground of appeal raises had already been decided in ***Kean***, the issue involves a substantial question of principle affecting the administration of criminal justice. That justifies granting Bogidrau special leave to appeal against his sentence. In accordance with the Supreme Court's usual practice, I would treat the hearing of the petition for special leave as the hearing of the appeal, but for the reasons I have endeavored to give, I would dismiss the appeal.

Aluwihare, J

18. I agree with the reasoning and conclusion of Keith J.

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Hon. Mr. Justice Saleem Marsoof
Justice of the Supreme Court

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Hon. Mr. Justice Brian Keith
Justice of the Supreme Court

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Hon. Mr. Justice Buwaneka Aluwihare
Justice of the Supreme Court