IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0022 of 2018
[On Appeal from Court of Appeal No: ABU 0088 of 2014]

BETWEEN : **NACANI TIMO**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court
Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court

Counsel : **Ms. Nasedra, for the Petitioner**

Mr. Burney, L. with Mr. Samisoni, E., for the Respondent

Date of Hearing : **21st August 2019**

Date of Judgment : **30th August 2019**

JUDGMENT

Gates, J

1. I have read in draft the judgment of Lokur J. I am in full agreement with it, its reasons, and with the orders to be made. I add a few observations of my own.

2. The dilemma of how the non-parole period is to be ordered in a sentence of imprisonment and how it relates to the remission of that term, an administrative matter, has troubled both serving prisoners and the courts.

3. The relevant part of Section 18 of the Sentencing and Penalties Act states:

> *"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.*
>
> *(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)."*

4. Remission of sentence is dealt with at sections 27 and 28 of the Corrections Service Act:

> *"[CS27]* ***Initial classification***
>
> *27 (1) All convicted prisoners shall be classified in accordance with the procedures prescribed in Commissioners Orders.*
>
> *(2) 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.*
>
> *[CS28]* ***Remission of Sentence***
>
> *28 (1) 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.*

(2) The Minister may grant further remission upon the recommendation of the Commissioner given in accordance with any criteria prescribed by regulations or the Commissioners Orders.

(3) Procedures for appeal against a decision to forfeit any entitlement to remission may be prescribed by regulations or Commissioners Orders."

5. The Sentencing and Penalties Act came into force subsequent to the Corrections Service Act, but had not referred to the scheme for remission or how orders for ineligibility for parole might affect a prisoner's entitlement to remission. Remission is not a right but an entitlement to be earned. The initial classification of a prisoner calculates the possible release date after remission of one third of the term of imprisonment has been deducted. That advantage can only be attained if the prisoner is of good behaviour during his term, and in other respects complies with Commissioner's Orders.

6. However as Lokur J points out in his following judgment, the legislative schemes for remission and for parole are different. This means that remission remains to be calculated as set out in the Corrections Services Act [sections 27 and 28] and in no other way.

7. But remission earned cannot be entered upon until the period of non-parole ordered by the court is over. Once that bar or impediment, the ineligibility for consideration for parole, has gone and the period of ineligibility served, then the prisoner may proceed on the remission earned by good behaviour and other compliances.

8. There is no support in the Corrections Legislation for the present administrative decision to apply remission only to the remaining post non-parole term of the sentence of imprisonment. The written law as it has been passed by Parliament is to be applied.

9. It would seem that judicial officers may not be inviting specific submissions on the applicability of section 18(2) of the Sentencing and Penalties Act.

10. The two issues for consideration under that sub-section are "the nature of the offence" and "the past history of the offender." These terms may indicate first a consideration of the gravity of the offence. 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. Similarly 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 alone without an order for a period of ineligibility for parole.

11. The courts require submissions on these two issues. They affect the right to freedom and need therefore to be specifically addressed. Judicial officers need to justify the imposition of non-parole periods close to the head sentence, or indeed for the decision not to impose one at all, for section 18(1) speaks in terms of "must fix a period…"

12. The purpose behind the non-parole order was explained in **Maturino Raogo v The State**, Criminal Appeal CAV003 of 2010 (19th August 2010) at para 16:

> *"16. The legislature's intention was to provide for those who committed a very serious offence or repeat serious offences. They could be kept in prison for a minimum term and during this period they would not be able to commit further crimes. The expression used by judges implementing this power was "warehousing". If a repeat serious offender was "warehoused" in prison, then during the period of such imprisonment he would not be able to commit severe serious offences to the detriment of members of the public."*

13. A serious repeat offender who is not responding to rehabilitation is a justifiable concern to the normal law-abiding public. Such persons may find the court will insist on him or her being kept incarcerated for a term close to the head sentence. The non-parole order must keep within the limits provided by section 18(4). Such orders must be accompanied by brief reasons stating the purpose of what is in effect a harsher term.

14. We feel section 18(2) has not been sufficiently addressed, both in submissions and in the sentencing judgment. Hence the orders for this matter to be addressed now by the High Court after hearing specific submissions on the two issues.

Jayawardena, J

15. I agree with the draft judgment.

Lokur, J

16. This is an appeal against the sentence and non-parole period awarded to the Petitioner by the High Court and affirmed by the Court of Appeal.

Background and issue

17. The question for consideration relates to the sentence awarded to the Petitioner (Nacani Timo) particularly with reference to the non-parole period. A human rights issue has been raised by the Petitioner who was accused of aggravated robbery contrary to Section 311(1)(a) of the Crimes Act 2009. He pleaded not guilty, but after the third prosecution witness completed his evidence, the Petitioner entered a guilty plea.

18. The Petitioner's guilty plea was accepted by the learned judge of the High Court and he was convicted and sentenced to a term of imprisonment of 13 years but with a set off of 11 months during which period he was in custody. The remaining sentence (colloquially called 'head sentence') was 12 years 1 month on which the learned judge awarded a non-parole term of 11 years 6 months. His appeal against the conviction and sentence was dismissed by the Court of Appeal by a judgment and order dated 30th August, 2018. The Petitioner then sought leave to appeal to this Court against his conviction and sentence. By a judgment and order dated 25th April, 2019 the application for leave to appeal was granted but his appeal against conviction was dismissed on merits[1]. The appeal against the sentence was adjourned for further hearing

[1] Timo v. State, [2019] FJSC 1

at a later session of this Court in 2019. It is under these circumstances that the issue of the sentence and non-parole period is now before us.

19. The occasion for further hearing arose because of the question posed by the Court in the following manner:

> *"35. I finally turn to the only real issue of the principle which the sentencing of Timo raises. It relates to the non-parole period. It was very close to the head sentence. There was a difference of only 7 months. Did the judge fall into legal error in imposing a non-parole period so close to the head sentence?*
>
> *38. ..... Subject to an important complicating factor which needs addressing, for a head sentence of 12 years' and one month's imprisonment, a more appropriate non-parole period would have been in the region of 10 years.*
>
> *40. ..... Although the head sentence in Timo's case was 12 years and one month, Timo will have to serve, in view of the Commissioner's practice, almost 11 years and 11 months before he can be released – though I recognise that this was partly the consequence of the non-parole period being so close to the head sentence. The effect of all this is that even if we were to substitute a non-parole period in this case of 10 years for the 11 years and 6 months fixed by the judge, Timo would not be released, on the basis of the Commissioner's practice, until he has served almost 11 years and 5 months."*

20. This Court discussed an earlier decision rendered in ***Bogidrau v. The State***[2]. In that case the applicant was sentenced to 6 years and 6 months imprisonment with a non-parole period of 5 years. This Court said in ***Bogidrau*** that: "*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*

[2] [2016] FJSC 5

released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission."

21. The reason for incorporating a non-parole period in a sentence awarded to a convict was explained in ***Maturino Raogo v. The State***[3] (endorsed by this Court in ***Paula Tora v. The State***[4]) in the following manner: "*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.*" Unfortunately, this view erroneously assumes that remission is a matter of right and will always be granted and most (if not all) convicts are recidivists.

Understanding the non-parole period and its implications

22. Non-parole period has been defined in the Sentencing and Penalties Act 2009 as:

> *"non-parole period" means any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole;*

23. The provision for determining the non-parole period by a Court is to be found in Section 18 of the Sentencing and Penalties Act 2009. This reads as follows:
    a. 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.
    b. (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] Criminal Appeal CAV 003 of 2010 (19th August, 2010)
[4] [2015] FJSC 23

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

24. While it does appear from a reading of Section 18(1) that the Court "must fix" a non-parole period, that mandate has been whittled down in Section 18(2) and a discretion is given to a Court to decline to fix a non-parole period if it is considered inappropriate to do so. The Court may decline to fix a non-parole period on a consideration of the nature of the offence, or the past history of the offender or even both. It is clear that a very wide discretion is conferred on the Court to decline to fix a non-parole period. Therefore, even though the offence is heinous, the Court may, in its discretion under Section 18(2) decline to fix a non-parole period.

25. On the other hand, there could be a case in which the Court fixes the non-parole period for the entire duration of the head sentence, or in another case if the sentence is for 12 years, the Court could fix a non-parole period of 11 years and 6 months, which is almost the entire term. This would be within Section 18(4) of the Sentencing and Penalties Act 2009 which provides that any non-parole period fixed under Section 18 must be at least 6 months less than the term of

the sentence. Effectively therefore, a convict could spend almost the entire period of sentence in custody without the benefit of good behavior.

26. It is quite clear that in the matter of fixing a non-parole period, the discretion given to a Court is extremely wide. This is quite unlike in South Africa where under Section 276B(1) of the Criminal Procedure Act, 51 of 1977 (as amended until 2008) the Court may impose a non-parole period not exceeding two thirds of the term of imprisonment imposed or 25 years, whichever is shorter.

27. The Sentencing and Penalties Act 2009 also gives no guidance to a Court as to when and in which category of cases a non-parole period should be fixed or not fixed. Therefore, a question arises: What should be the procedure, in accordance with the requirements of justice, that a Court should adopt for awarding (if at all) a non-parole period to a convict?

28. This question is important because the effect of a Court directing a non-parole period on a convict is that the convict cannot be released prior to completion of the non-parole period. This could impact on the delivery and administration of justice in several ways – not only for the convict through a curtailment of his or her human right of personal liberty, but also for the Executive through a curtailment of its statutory power of granting remission and encroaching on its powers of early release of prisoners under the Corrections Service Act 2006 read with the Corrections Service Regulations 2011. It could also have an impact on society and its safety and well-being.

Parole from the perspective of the convict

29. Section 2 of the Corrections Service Act 2006 defines "competent authority" as an authority authorized under this Act or any other written law to release prisoners on parole.

30. Section 48 provides that every officer in charge shall be responsible for ensuring that every prisoner is discharged, *inter alia*, in accordance with any decision made by any competent authority authorizing a prisoner's release on parole.

31. Section 49 "establishes" a Parole Board consisting of independent persons whose function is to make recommendations to the Minister relating to:
    (a) The release on licence of any person serving a sentence, including a sentence for life or to recall to prison of any person who has been released on licence;
    (b) The conditions to apply to any release on licence, including a variation or cancellation of any conditions previously applied;
    (c) Any other matter referred to it by the Minister related to the release on licence or the recall of persons previously released; and
    (d) Any other matter prescribed by regulations.

32. Section 49A provides that the Minister may, upon the recommendation of the Parole Board, direct that a prisoner be released on such terms and conditions as the Minister may think fit.

33. A reading of these provisions of the Corrections Service Act 2006 makes it explicit that grant of parole is subject to the recommendation of the Parole Board. The Parole Board may even grant parole to a person serving a life sentence. However, the recommendation of the Parole Board is subject to the decision of the Minister who may or may not accept the recommendation. Therefore, parole is not a right[5] that a convict can avail of, but surely a convict has a legitimate expectation that if he or she maintains 'good behaviour' in custody, the convict might be considered and perhaps released on parole subject to conditions.

34. When the Court fixes a non-parole period (although it may not) it effectively interdicts the release of the convict for a determinate period. The personal liberty of a convict is curtailed by an order of the Court through the exercise of power of fixing a non-parole period. This is quite a drastic power and to make it reasonable, it should be exercised by a Court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. This is necessary because a non-parole period is a curtailment of a convict's personal liberty for a specified period and the order of the Court effectively encroaches on the power of the Parole Board under Section 49 of the Corrections Service Act 2006 to grant parole. Personal liberty is a constitutional right and it

[5] That parole is not a right is also the view expressed in the written submissions of the State in paragraph 28

ought not to be taken away or curtailed by a Court without a hearing and for reasons to be recorded in writing otherwise it could lead to an *ex parte* and arbitrary exercise of power – and perhaps a discriminatory exercise of power where one set of convicts is treated in a particular manner and another set of similarly situate convicts is treated differently.

35. There is a reason why the Legislature has left the award of a non-parole period open ended for the Court. This is because the Legislature appreciates that while exercising the power of fixing a non-parole period, the Court is making a prognosis of the future conduct of the convict – an assessment for which the Court has no real expertise or information at all. A convict has a human right to be treated fairly not only during a trial, but also at the sentencing stage, including on the question of awarding or declining to award a non-parole period and the Legislature recognizes this. A convict's future conduct is best left to the expertise and experience of the correctional services and authorities who are statutorily bound to supervise the continuing conduct of a convict, rather than it to be judged on the basis of the past or present conduct[6]. In a sense, when the Court fixes a non-parole period, it substitutes its wisdom for that of the Executive, with perhaps little or no expertise.

Parole from the perspective of the Executive

36. Essentially the grant of parole is within the domain of the Executive as is evident from the Corrections Service Act 2006. However, this power can be restricted by the Courts through Section 18 of the Sentencing and Penalties Act 2009. Merely because a dominant power has been conferred on the Courts does not imply that the Courts "must" exercise that power. This is made clear by Section 18(2) of the Corrections Service Act 2006. Therefore, the legislative mandate is that the primary power to grant parole is vested in the Executive, but the Courts have been given the authority to restrict it. Consequently, the power to fix a non-parole period should be exercised by the Courts in exceptional cases and circumstances and where that power is exercised it must be preceded by a hearing and supported by reasons, an important aspect of natural justice as far as it concerns a person whose personal liberty is being curtailed or taken

[6] Part 2 of the Corrections Service Regulations 2011

away and as far as it concerns the Executive whose power to grant parole is curtailed or taken away.

37. In exercising the authority of fixing a non-parole period, the Court is, in a sense, circumscribing the exercise of power by the Parole Board and the Minister under the Corrections Service Act 2006. There may well be an extraordinary case in which the Parole Board and the Minister are of opinion that the convict is deserving of parole, but their hands would be tied because of an order of the Court fixing a non-parole period. This could amount to encroaching or subverting the discretionary power given by law to the Parole Board and the Minister, which the Courts would be loathe to do. It is for this reason that the Courts should be cautious and circumspect. This is not to say that the Courts should not fix a non-parole period in any case, but that the Courts may do so in exceptional cases and circumstances and after following a set procedure.

38. The sum and substance of this discussion is that enabling a convict to avail parole is negatively conferred on the Judiciary (through declining to fix a non-parole period) and positively on the Executive by granting parole. Applying the doctrine of the separation of powers, the Judiciary should be circumspect and use its authority to fix a non-parole period in exceptional cases and where it is absolutely necessary to do so and in accordance with a just, fair and reasonable procedure.

Understanding Remission

39. **Parole** means the conditional release of a prisoner from prison[7]. The conditional release of a prisoner from imprisonment before the full sentence has been served and although not available under some sentences, parole is usually granted for good behavior on the condition that the parolee regularly report to a supervising officer for a specified period[8]. As against this, **Remission** means cancellation of a part of a prison sentence[9]. A pardon granted for an offence or a relief from a forfeiture or penalty[10].

[7] Oxford Dictionary of Law, Eighth Edition, 2015
[8] Black's Law Dictionary, Tenth Edition
[9] Oxford Dictionary of Law, Eighth Edition, 2015
[10] Black's Law Dictionary, Tenth Edition

40. Parole and remission are two different and distinct concepts that appear to have been inadvertently mixed up as is evident from the written submissions of the State. We have already adverted to the concept of parole and fixing a non-parole period.

41. Remission is dealt with in Sections 27 and 28 of the Corrections Service Act 2006. Section 27 provides that all convicted prisoners shall be classified as per the laid down procedure and sub-section (2) provides that: "*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.*"

42. Section 28 provides that a convict may be granted remission of his or her sentence on the orders of the Commissioner on "the good behaviour of the prisoner" and it may also be forfeited by the Commissioner.

43. Remission is further dealt with in Part 5 of the Corrections Service Regulations 2011. Regulation 18 enables the officer in charge of prison offences to forfeit any remission applying to a prisoner on the grounds of misbehavior. The procedure for forfeiture and a provision for an appeal to the Commissioner against a forfeiture order is provided for.

44. Regulation 19 empowers the Commissioner to make a recommendation to the Minister for granting further remission in respect of the sentence of any prisoner on compassionate or humanitarian grounds.

45. The remission provisions indicate that remission is also not a right[11] that could be exercised by a convict. The provisions also indicate that the period of remission in a given case could exceed one-third of the sentence awarded. These provisions also indicate that the Court has nothing whatsoever to do with remission of a sentence and it is solely within the domain of the Executive.

[11] That remission is not a right is also the view expressed by the State in its written submissions in paragraph 28

46. Unfortunately, a practice has evolved through which remission has been made dependent on the non-parole period fixed by the Court, despite the two powers and concepts being distinct and independent. This was noted in ***Paula Tora v. The State***[12] in the following words:

> *"..... 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."*

47. The existence of this practice stands confirmed by the State in its written submissions read with a communication dated 23rd July, 2019 sent by the Legal Counsel. The relevant portion of the communication is as follows:

> *"Now with regards to remissions, say for instance if a person is committed to imprisonment for 3 years with a non-parole of 2 years on 22.07.19. This person will not be entitled to any parole or early release for the next 2 years commencing 22.07.19. When the person has served the 2 years non-parole period which falls on 22.07.21, the remaining 1 year of his sentence will then be calculated for the one third remission. What we do is we will then convert the 1 year into months and then divide by 3 which comes to 4 months. Remission is 4 months and when extracted from the 1 year he gets to serve only 8 months".*
>
> *Therefore the remaining sentence the prisoner will serve is 8 months.*
>
> *Looking at the time remaining to serve the prisoner automatically qualifies under one of the criteria for early release in that the prisoner's since must be within 12 months from the date of discharge. The second is that he must have a low security rating. So if a prisoner has satisfied these requirements after serving the non-parole period of their sentence. They are immediately eligible for early release."*

[12] [2015] FJSC 23

48. We are afraid that through this process, the Executive is surrendering its power to grant remission of sentence to a prisoner in an appropriate case by subordinating it and making it dependent on the non-parole period. This does not seem to be the intent of the Corrections Service Act 2006 and the Corrections Service Regulations 2011 which places the two concepts in different compartments and both have to operate in conjunction and harmoniously.

49. Since remission and parole or non-parole period are completely different in content and meaning, mixing them up leads to the confusion that is evident from the view taken by the Legal Counsel, which does not have the sanction of law and acts to the detriment of the personal liberty of a convict by requiring him or her to remain in custody for a period longer than necessary. The correct position in law is that if a convict is given remission of sentence, it will have full play but subject to any order that might be passed by the Court with regard to the non-parole period. In other words, the remission period is dormant or kept in abeyance till the expiry of the non-parole period.

Impact on a convict by mixing up parole and remission

50. The calculation of the remission period in the case of the Petitioner illustrates the inequity of the practice adopted by the State. The Petitioner was sentenced to 13 years imprisonment. He had already been in custody for 11 months. Therefore the balance period of imprisonment or the head sentence was 12 years 1 month. The non-parole period fixed was 11 years 6 months. Therefore, there are two possible scenarios: (i) The period of one-third remission is calculated on the basis of 12 years 1 month minus 11 years 6 months, that is 7 months of which one-third would be (say) 2 months. In other words, out of a total of 12 years 1 month sentence of imprisonment, the Petitioner would get remission of about 2 months and would be in custody for about 11 years 10 months plus 11 months set off period, making a total of 12 years 9 months incarceration out of 13 years. This is as per the understanding of the State. (ii)) The period of one-third remission is calculated on the basis of 13 years minus 11 years 6 months, that is 18 months of which one-third would be 6 months. Therefore, the Petitioner would have a remission period of 6 months as against a remission period of 2 months in scenario (i). The

convict would therefore be in custody for 12 years out of a sentence of imprisonment of 13 years. As mentioned above, scenario (i) above is the practice followed by the State, which is stated to be in consonance with decisions rendered by the Courts, though not having any legislative sanction.

51. However, if the remission period is kept separate as it should be according to the statute, the Petitioner would get remission of 4 years 4 months out of a term of 13 years. Therefore, on completing 11 years 6 months non-parole period, the Petitioner would be free to walk out of prison (subject to good behavior). The benefit to the Petitioner would be 1 year 6 months as against the practice followed which would give him a benefit of about 2 months on the calculation made by the State. Either way, the Petitioner would be in custody for several months more than necessary (assuming he gets one-third remission). Should this be permitted particularly when the Constitution recognizes personal liberty as a fundamental right? The answer is in the negative.

Assistance rendered by the State

52. This Court noted in ***Kean v. The State***[13] and in ***Bogidrau*** that it might not be appropriate to rewrite the "questionable" practice adopted by the Commissioner but encourage the Commissioner to review it, since it could be an infraction of Section 18(4) of the Sentencing and Penalties Act 2009. No review has taken place over the last four years. It was observed in the decision of this Court on 25th April, 2019 that two options are available to the Courts: (i) "[Take] the initiative and not shrink from reducing an otherwise appropriate non-parole period if that is what is required to achieve the policy objective…" (ii) This Court should have "the benefit of considered submissions on behalf of the State." For this purpose, the hearing was adjourned to the present sitting of this Court.

53. Unfortunately, the "considered submissions" on behalf of the State do not take us very far in as much no legislative sanction has been shown to us for the practice adopted by the State. We are therefore left with no alternative but to 'take the initiative' and declare that the practice

[13] [2015] FJSC 27

followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period is statutorily impermissible and constitutionally invalid and having no legislative backing. In other words, the practice followed by the State as mentioned in the communication dated 23rd July, 2019 sent by the Legal Counsel is not in accordance with law and must be stopped forthwith. The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court. We may add that despite our reluctance to do so, we have had to 'take the initiative' having been left with no other alternative.

Conclusions

54. The following conclusions emerge from a review of the decisions of the Courts and the laws:

(i) Parole and remission are distinct concepts and are not rights but entitlements that a prisoner must earn.

(ii) It is not mandatory for a Court to award a non-parole period to every convict. However, a decision to award or decline to award a non-parole period must be taken by a Court after hearing a convict and the decision must be accompanied by reasons, with an economy of words, as a part of a just, fair and reasonable procedure keeping the interests of the convict and society (including the victim) in mind.

(iii) The period of remission earned by a convict during the non-parole period is kept dormant or in abeyance during that period. The remission period is not wiped out and there is no law even suggesting a wipe-out. Consequently, a convict must be given the benefit of remission (if earned) when it is due on the total sentence and not the head sentence. The present practice on the subject followed to the contrary by the Commissioner, as evident from the communication dated 23rd July, 2019 is not supported by legislation and ought to be discontinued forthwith.

55. We find from the record that the Petitioner was not heard on the question of the non-parole period. Accordingly, we remit the matter to the High Court for the limited purpose of hearing the Petitioner on the question of whether a non-parole period should be fixed in his case and if so, the period. The High Court will give brief reasons for its decision.

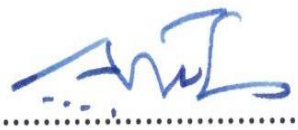
56. With regard to the sentence awarded to the Petitioner, we have considered the submissions made and have gone through the record. The sentence is in accord with the sentencing guidelines and we find no reason to interfere with it. To this extent the appeal of the Petitioner is dismissed.

57. We would like to add that Section 49 of the Corrections Service Act 2006 establishes a Parole Board. We have been informed that despite the Parole Board having been established by law passed by Parliament, it has not been constituted and operationalized. We hope and trust that the rule of law will be adhered to in this regard and the Parole Board constituted and operationalized at the earliest keeping in mind the right of personal liberty in the Bill of Rights.

58. We record our appreciation for the valuable assistance rendered by learned counsel for the Petitioner (Ms. Nasedra) and the learned counsel for the State (Mr. Burney and Mr. Samisoni) in resolving a difficult question of law.

The Orders of the Court:

1. The High Court will decide the award of non-parole period (if any) for the Petitioner, after hearing him and will record brief reasons for its decision.
2. There will be no order as to costs.



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Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

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Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

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Hon. Mr. Justice Madan B. Lokur
Judge of the Supreme Court

Solicitors:

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Mr. Burney, L. and Mr. Samisoni, E. for the Respondent.