IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 13 of 2020
Court of Appeal No. AAU 109 of 2013
High Court No. HAC 225 of 2011

BETWEEN: **AINARS KREIMANIS**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court

Counsel: **Petitioner in person**
Mr R Kumar for the Respondent

Date of Hearing: **9 June 2023**

Date of Judgment: **29 June 2023**

JUDGMENT

Temo, AP

[1] I had read the draft judgment of His Lordship Mr. Justice William Calanchini. I entirely agree with his views, reasons and conclusion.

[2] However, before I leave this case, I would like to reiterate the observation Justice of Appeal Prematilaka made in the Court of Appeal regarding this case. He said,

> *"[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; 9 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.*
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> *[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 5.6279kg 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)]."*

[paragraphs 3 and 4 of **Ainars Kreimanis v The State**, Criminal Appeal No. AAU 109 of 2013, Court of Appeal, 27 November 2020]

[3] In **Abourizk v The State**, Criminal Petition No. CAV 0013 of 2019, 28 April 2022, this court only quashed the convictions of the petitioners in the High Court on 22 April 2016. It said nothing about the sentencing tariff established by the Court of Appeal in **Abourizk v The State**, Criminal Appeal No. AAU0054 of 2016; 0059 of 2016 and 0062 of 2016, 7 June 2019. From paragraphs 121 to 158, His Lordship Mr. Justice of Appeal Prematilaka

discussed the sentencing guideline for hard drugs in Fiji. In paragraph 145, he said the following:

> *"[145] Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.). These guidelines may apply across all acts identified under section 5(a) and 5(b) of the Illicit Drugs Control Act 2004 subject to relevant provisions of law, mitigating and aggravating circumstances and sentencing discretion in individual cases.*
>
> ***Category 01:- Up to 05g – 02½ years to 04½ years' imprisonment.***
>
> ***Category 02:- More than 05g up to 250g – 03½ years to 10 years' imprisonment.***
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> ***Category 03:- More than 250g up to 500g – 09 years to 16 years' imprisonment.***
>
> ***Category 04:- More than 500g up to 01kg – 15 years to 22 years' imprisonment.***
>
> ***Category 05:- More than 01kg – 20 years to life imprisonment.***"

[4] In my view, the above sentencing tariff is still applicable as of today. In that light, the petitioner is extremely fortunate to be walking away with only 12 years imprisonment (the non-parole period).

Calanchini, J

[5] **Introduction**

This is a petition for leave to appeal the decision of the Court of Appeal delivered on 27 February 2020. Following a trial in the High Court at Lautoka the Petitioner was convicted on one count of being in possession of an illicit drug, namely Methamphetamine weighting 5.6 kg pursuant to section 5(a) of the Illicit Drugs Control Act 2004. On 15 October 2013 he was sentenced to 13 years 1 month imprisonment with a non parole period of 12 years.

Background Proceedings

[6] Being aggrieved by the orders the Petitioner filed a timely appeal against conviction and sentence. The Petitioner relied on 4 grounds of appeal against conviction and two grounds against sentence. The application for leave proceeded before a Judge of the Court who dismissed the application for leave to appeal conviction and sentence. The renewed application for leave came before the Court of Appeal on 3 February 2020. During the course of the hearing the Petitioner, who appeared in person, applied to abandon his renewed application for leave to appeal against conviction and sought to proceed on the application for leave to appeal against sentence on grounds that had not been raised in his application for leave before the Judge of the Court.

[7] The new grounds of appeal against 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 sentencing 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-parole period too close to the head sentence (not giving the appellant any hope of rehabilitation as incentive of good behavior whilst in prison) which is against the practice in commonwealth jurisdictions."*

[8] The Court of Appeal treated the new grounds of appeal against sentence as a fresh appeal requiring the Petitioner to file an application for enlargement of time. An alternative approach would have been to regard the new grounds as constituting an application to amend the Notice of Appeal. In any event the Court of Appeal refused the Petitioner's application for an enlargement of time and affirmed the sentence imposed by the High Court.

[9] The Petitioner then filed a timely petition challenging the Court of Appeal's decision. The grounds relied upon in the Petition are:

"Whether the Fiji Court of Appeal was correct that the non-parole term imposed by the learned trial Judge was justified when in fact the non-parole term stipulated under section 12 of the Sentencing and Penalties Act 2009 is a dead letter in the non-existence of the parole board functioning in Fiji.

That the current practice of the Commissioner of Fiji Correction Service regarding the commencement of the non-parole term and calculation of remission of sentence where a non-parole term is fixed is questionable and has no legislative backings and sanctions."

[10] Although these grounds are not worded in the same terms as those considered by the Court of Appeal, it is apparent that one of the grounds against sentence in both courts relates to the issue of calculating the term that a prisoner must serve taking into account the non-parole sentence fixed by a trial Judge under section 18(1) of the Sentencing and Penalties Act and the date of release for initial classification purposes calculated by deducting a remission of one third of the head sentence under section 27(2) of the Corrections Service Act 2006. Consequently, the Petition for Leave having been lodged within the time prescribed by the Supreme Court Rules was regarded as timely by this Court since the issues were connected.

Background Facts

[11] The background facts to the conviction were summarized by Nawana JA in the Court of Appeal at paragraph 9 of the Judgment as follows:

"The appellant, a Latvian national arrived in Fiji on board a flight from Hong Kong on 11 November 2011. He was detected with the illicit substance of methamphetamine concealed inside a photo frame in his baggage at the border control area at the Nadi International Airport. The weight of the illicit substance in the Petitioner's possession was 5.628 kg. After investigation the Petitioner was charged under section 5(a) of the Illicit Drugs Control Act 2004."

Past Practice

[12] Turning to the issue raised by the two grounds in the Petition. Since 2010 there was a practice applied by the Commissioner of Prisons for calculating the date of release of a

prisoner that involved reference to both the early release date after remission had been calculated and to any non-parole period fixed by the sentencing Court under section 18(1) of the Sentencing and Penalties Act. First, the Commission considered the non-parole period as his starting point. By example, assume a person has been sentenced to 12 years head sentence with a non-parole term of 10 years. The starting was 10 years which the Commissioner regarded as a sentence that must be served. The one third remission was calculated as the difference between the head sentence and non-parole sentence. In the present example the difference is 2 years. The Commissioner would then add to the non-parole sentence the two thirds remaining after the one third remission. A one third remission on 2 years (24 months) is 8 months and the two thirds being 16 months was added to the non-parole term of 10 year with a sentence to be served of 11 years and 4 months before release. As a result the prisoner always served a sentence in excess of his non parole period but usually less than the head sentence. It must be noted that this approach by the Commissioner was prompted to some extent by the absence of any functioning parole board in Fiji.

Amending legislation

[13] This approach had been the subject of frequent judicial comment (mostly unfavourable) by both the Court of Appeal and the Supreme Court. The criticism of this approach was prominent in the Supreme Court's recent decision in **Nadan v The State** [2019] FJSC 29; CAV 7 of 2019 (31 October 2019). It was shortly after that decision that the Government introduced amendments to both section 18 of the Sentencing and Penalties Act and section 27 of the Corrections Service Act. The amendments were brief and can be reproduced omitting formal provisions:

> *"2. Section 27 of (the Act) is amended after subsection (2) by inserting the following new subsections:-*
>
> *(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009 for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one third of the sentence not taking into account the non-parole period.*

(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18, the prisoner must serve the full term of the non-parole period.

(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.

3. The Sentencing and Penalties Act is amended by:

(a) in section 18:-

(i) in subsection (1), deleting 'subject to sub section (2), when' and substituting 'when' and
(ii) deleting subsection (2); and

(b) deleting subsection 20(3)."

[14] The amendments to section 27 apply to any sentence imposed before or after the commencement of the amending Act. The amending legislation came into force on 22 November 2019 and has retrospective effect. The section 27 amendments therefore apply to the Petitioner and his grounds of appeal must be considered in the context of the amended legislation.

[15] In his oral submissions the Petitioner claimed that the sentence that he was required to serve before release was 8 years 8 months 20 days. In his written submissions at paragraph [17] he claimed that he should have been released after serving 9 years 4 months 10 days. Neither calculation is explained in a manner that would enable the Court to determine how the proposed release dates were calculated.

[16] In my opinion when applying the amended legislation to the sentence imposed on the Petitioner by the trial Judge the following step are to be taken. First, the (head) sentence is identified. In this case the sentence is 13 years 1 month. The second step is to calculate the one third remission for initial classification purposes. One third of 13 years 1 month being 157 months is in round terms 52 months leaving 105 months or about 9 years to be served not taking into account the non-parole term." Then it is necessary to turn to the

non-parole term of 12 years. It is clearly stated in subsection 27(4) that "the prisoner must serve the full term of the non-parole period. The end result is that the Petitioner must serve the non-parole period of 12 years although the period to be served at initial classification of 9 years is less than the non-parole period of 12 years.

[17] The amendments to section 27 mean that when a prisoner has a non-parole term fixed as part of his sentence the prisoner is to be released (provided that he has been of good behavior) either after he has served two thirds of his sentence or on the expiry of the non-parole period, whichever is the later. [see the judgment of Keith J in **Bogidrau v the State** [2016] FJSC 5; CAV 31 of 2015 (21 April 2016)]

Additional Issues

[18] There may be situations where the release date calculated in accordance with section 27 (3) of the Corrections Service Act is beyond the non-parole period. For example, when the head sentence is 6 years and the non-parole term is 3 years the early release date after the one third remission is 4 years which exceeds the non-parole period of 3 years. It follows that the prisoner must serve the 4 years sentence.

[19] If the non-parole period alone is to determine the release date then there would be no reason for the mandatory reference to remission calculations in section 27 (3) of the Act. The expression in section 27(4) that "the person must serve the full term of the non-parole period" does not mean that in all cases the only sentence that the prisoner must serve is the non-parole sentence even when the balance of the sentence after remission is greater than the non-parole sentence. In fact the non-parole period is essentially similar to a minimum sentence in the present context when there is no functioning Parole Board. Furthermore to hold otherwise would effectively remove any discretion, powers or authority that the Commissioner has under the Corrections Service Act. If a prisoner knows with certainty that he will be released after having served the non-parole period there is no incentive for that prisoner to be cooperative or of good behavior. Such an interpretation would also limit the discretion of any functioning parole board.

[20] The retrospective application prescribed by section 27(5) applies only to sub sections (3) and (4). The amendments to section 18 of the Sentencing and Penalties Act do not operate retrospectively. Furthermore the repeal of section 18 (2) means that the discretion whether a non-parole period should be fixed has been taken away from the sentencing court. As from 22 November 2019 a sentencing court must fix a non-parole term when sentencing an offender to be imprisoned for life (as a maximum sentence but not as a mandatory sentence) or for a term of 2 years or more.

[21] This petition has raised a question of general legal importance being the application of the amending legislation that affects the method of calculating a prisoner's release date taking into account both remission calculations and the non-parole period. For that reason I would grant leave to appeal but dismiss the appeal for the reasons stated.

Qetaki J

[22] I have considered the draft judgment and I agree with it and the reasoning.

Orders

(1) Leave to appeal granted

(2) Appeal dismissed.

The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

The Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court