IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO: AAU 60 of 2010
(High Court HAC 108 of 2009)
(High Court HAC 61 of 2010)

BETWEEN	:	ELIA MANOA	*Appellant*
AND	:	THE STATE	*Respondent*
Coram	:	Calanchini P Gamalath JA Madigan JA	
Counsel	:	Ms S Waqainabete for the Appellant Mr L Fotofili for the Respondent	
Date of Hearing	:	11 September 2014	
Date of Judgment	:	25 September 2014	

JUDGMENT

Calanchini P

[1] The Appellant was charged in HAC 108 of 2009 with one count of robbery with violence under section 293(1) (b) of the Penal Code Cap 17 (the Penal Code) and one count of unlawful use of a motor vehicle under section 292 of the Penal Code. In

HAC 61 of 2010 he was charged with two counts of aggravated robbery under section 311 (1) (b) of the Crimes Decree 2009 (the Crimes Decree).

[2] In HAC 108 of 2009 the Appellant pleaded guilty to both counts on 20 July 2010 before Goundar J who proceeded to formally convict the Appellant as charged. In HAC 61 of 2010 the Appellant pleaded guilty to both counts on 29 July 2010 again before Goundar J who proceeded to formally convict the Appellant as charged.

[3] On 6 August 2010 the Appellant was sentenced in respect of all the offences. For the convictions in HAC 108 of 2009 the Appellant was sentenced to 10 years imprisonment for robbery with violence and 4 months imprisonment for unlawful use of motor car to be served concurrently.. For the convictions in HAC 61 of 2010 the Appellant was sentenced to a term of 10 years imprisonment for each of the two aggravated robberies to be served concurrently. The sentences imposed for the convictions in HAC 61 of 2010 were ordered to be served concurrently with the sentences imposed for the convictions in HAC 108 of 2009. The effect of the orders was that the Appellant was sentenced to a term of 10 years imprisonment and the learned Judge ordered a non-parole term of seven years.

[4] By letter dated 23 August 2010 and received by the Court of Appeal Registry on 31 August 2010 the Appellant applied for leave to appeal against sentence. The application for leave had been filed within the time limit of 30 days prescribed by section 26 of the Court of Appeal Act Cap 12 (the Act).

[5] On 21 July 2011 the Appellant filed an amended notice of appeal seeking leave to appeal against conviction as well as sentence. The application for leave to appeal against conviction was out of time since the time for filing such an application had expired on 6 September 2010. The application to amend his notice of appeal against sentence was filed in compliance with Rule 37 of the Court of Appeal Rules (the Rules).

[6] The Appellant's application for leave to appeal against sentence was initially heard by a single judge of the Court on 29 March 2011. Unfortunately the decision had not been handed down by the time the learned Justice of Appeal had left the Bench in June 2012. The application for leave to appeal against conviction and sentence was

re-heard on 12 October 2012. On 25 January 2013 the learned Justice of Appeal delivered his judgment refusing the applications for leave to appeal against conviction and sentence.

[7] It is appropriate at this point to comment briefly on the Appellant's application for leave to appeal against conviction. The application for leave was out of time by more than 9 months. The Appellant's application was in fact an application for leave to appeal out of time or more accurately an application for an extension of time within which an application for leave to appeal against conviction may be given pursuant to section 26 of the Act. Such an application may be heard by a single judge of the Court pursuant to section 35 (1) of the Act. The factors to be considered by the Court or a single judge when exercising the discretion whether to extend time were discussed and outlined by the Supreme Court in **Sinu –v- The State** (unreported CAV 1 of 2009; 21 August 2012; [2012] FJSC 17). Two of the factors that the court is required to consider are (1) whether there is a ground of appeal justifying the appellate court's consideration and (2) where the delay has been substantial, nevertheless is there a ground of appeal that will probably succeed. It follows as a matter of logic that if the court grants the application for an extension of time, then it has in the course of reaching that decision already concluded that the Appellant has raised an arguable point which is the test for granting leave to appeal. It is therefore illogical to on the one hand grant an extension of time and then on the other hand to refuse leave to appeal.

[8] By notice dated 26 February 2013 the Appellant applied to renew his applications for leave to appeal against conviction and sentence to the Court of Appeal pursuant to section 35(3) of the Act. That notice sets out the grounds upon which the Appellant relied for his renewed application. In a letter dated 6 February 2014 the Appellant sought the Court's intervention (albeit by way of judicial review) to review advice given by the Solicitor-General's office that the remission to which a serving prisoner may be entitled to receive under the Corrections Service Act 2006 only becomes available and can only be calculated on the balance of the prison sentence once the non-parole term has been served. Alternatively the Appellant sought an order from the Court to remove from the sentence the order that the Appellant serve a non-parole term of 7 years.

[9] When the applications were called on for hearing Counsel for the Appellant informed the Court that the Appellant was withdrawing his renewed application for an extension of time to apply for leave to appeal against conviction. Counsel also informed the Court that the only application in respect of sentence was in relation to his request that the Court of Appeal vary the sentence by removing the requirement that he serve a term of 7 years imprisonment before being eligible for parole. Counsel submitted that the Appellant was making his application in order to receive the one third remission that may be granted to serving prisoners under the Corrections Service Act.

[10] The offences for which the Appellant was convicted in HAC 108 of 2009 were committed on 4 September 2009. The relevant law to be applied was the Penal Code. The offences for which the Appellant was convicted in HAC 61 of 2010 were committed on 13 March 2010. The relevant law to be applied was the Crimes Decree. When the Appellant was sentenced in August 2010, the learned High Court Judge was required to sentence the Appellant in accordance with the provisions of the Sentencing and Penalties Decree 2009 (section 61). See **Koroivuki v The State** AAU 18 of 2010 delivered 5 March 2013.

[11] The obstacle that the Appellant faces is section 18 (1) of the Sentencing and Penalties Decree 2009 which provides:

> *"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."*

[12] Sub-section (2) provides that the court may decline to fix a non-parole period if the court considers that the nature of the offence or the past history of the offender makes it inappropriate to do so.

[13] In the present case the learned Judge fixed a non-parole period of 7 years imprisonment for each term of 10 years imprisonment in respect of each robbery with violence conviction to be served concurrently. In fixing the non-parole periods the learned Judge was doing no more than was required by section 18 (1) of the

Sentencing and Penalties Decree. There was no material before the High Court to indicate that section 18 (2) should have been invoked.

[14] At the sentencing hearing the Appellant was represented by Counsel. The learned Judge considered the submissions and indentified those factors which he properly regarded as aggravating and mitigating factors. The Judge has correctly identified and applied the sentencing principles in accordance with the Sentencing and Penalties Decree. There is no basis for saying that the learned Judge has erred in the exercise of his sentencing discretion when he fixed the non-parole term of 7 years. There is therefore no basis for either varying or removing the period fixed by the learned Judge for the Appellant to serve before being eligible parole.

[15] The position concerning the non-parole term of imprisonment and the possible early release under the remission entitlement for which provision is made in the Corrections Service Act was considered by the Supreme Court in **Chand –v- The State** (CAV 3 of 2012; 24 April 2013). The effect of that decision is that the non-parole term ordered to be served must be served before any entitlement to remission can be taken into account.

[16] The result is that the appeal against conviction is dismissed and the renewed application for leave to appeal against sentence is refused.

Gamalath JA

[17] I agree.

Madigan JA

[18] I have read the judgment of the President of the Court and I agree with it entirely. Both the appeal against conviction and the application for leave to appeal against sentence should be refused for the reasons stated in the President's judgment.

Orders:

(1) Appeal against conviction is dismissed.

(2) Application for leave to appeal sentence is refused.

HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL

HON. MR JUSTICE GAMALATH
JUSTICE OF APPEAL

HON. MR JUSTICE MADIGAN
JUSTICE OF APPEAL