IN THE COURT OF APPEAL, FIJI
[Criminal Appellate Jurisdiction]

Criminal Appeal No: AAU 009 of 2013
(High Court Case No. HAC 086 of 2009)

BETWEEN	:	**DOREEN SINGH**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Kapila Waidyaratne, JA** **Anthony Fernando, JA** **Priyantha Fernando, JA**
Counsel	:	**Mr. M. Yunus for the Appellant** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**13 September 2016**
Date of Ruling	:	**30 September 2016**

JUDGMENT

Waidyaratne, JA

1. I agree that the appeal against sentence should be dismissed and sentence affirmed.

Anthony Fernando, JA

2. The Appellant has appealed, after obtaining leave from a single Judge of this Court, against her sentence of six years imprisonment and the non-parole period of 5 years imposed on her conviction for three counts of money laundering amounting to $157,423.94, committed during the period of 24th May 2008 to 14th February 2009. The Appellant had been charged under section 69(2) (a) and 3 (a) of the Proceeds of Crime Act 1997. The Appellant has abandoned her appeal against conviction. According to the prosecution case, the Appellant who was employed as a Bank Teller at ANZ Bank Samabula had knowingly assisted others to encash fraudulent Fiji Electricity Authority (FEA) cheques.

3. The maximum sentence prescribed in the Proceeds of Crime Act 1997 for an offence under section 69(2)(a) and 3 (a) is a fine not exceeding $120,000 or imprisonment for a term not exceeding 20 years, or both where the offender is a natural person.

4. The tariff for money laundering offences in Fiji is a sentence between 8 to 12 years imprisonment. There is no complaint before us about the calculation of the head sentence that was imposed, save the fact that the non-parole period that was fixed is too close to the head sentence.

5. The Appellant had raised two grounds of appeal against the sentence, namely:

   i. The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence which conflicts with the Appellant's prospect for rehabilitation provided by section 4(1) (d) of the Sentencing and Penalties Decree 2009.

   ii. That the trial Judge erred in law when he did not separately deduct remand period as period already served according to section 24 of the Sentencing and Penalties Decree 2009.

6. It is trite law that a Court of Appeal will interfere with a sentence only where the Sentencing Court has:

a) Acted upon a wrong principle,
b) Taken into consideration irrelevant matters,
c) Failed to take into account relevant matters
d) Had been mistaken on the facts, or
e) Where the sentence is manifestly harsh and excessive.

7. As regards the first ground of appeal it is the Appellant's argument that with the head sentence of 6 years imprisonment and a non-parole period of 5 years, the one third remission normally applicable, will apply only to 1 year, making her eligible only for a 4 months remission and this takes away any prospect of rehabilitation. It is the Appellant's argument that the learned Sentencing Judge had not given reasons for not taking into account rehabilitation. The Appellant had therefore by way of relief sought from this court for the non-parole period to be reduced by a further year, in other words that the non-parole period should be set at 4 years instead of the present 5 years.

8. Section 4(1) (d) of the Sentencing and Penalties Decree 2009 relied upon by the Appellant shows that one of the purposes for which sentencing may be imposed by court is "to establish conditions so that rehabilitation of offenders may be promoted or facilitated". The other purposes enumerated in section 4 of the Sentencing and Penalties Decree 2009 are to protect the community from offenders, to deter offenders or other would be offenders, and to signify that the court and the community denounces the commission of such offences.

9. Section 18 of the Sentencing and Penalties Decree 2009 deals with fixing of non-parole period by the sentencing court. The provisions relevant to this case are as follows:

> *"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) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.*
>
> *(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." (emphasis added by me)"*

10. It is clear from section 18(2) of the Sentencing and Penalties Decree 2009 that the fixing of a non-parole period is at the discretion of the court and not a necessary must. In **Natini v State** [2015] FJCA 154: AAU102.2010 (3 December 2015) the Court of Appeal said:

> *"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case."*

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

I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and

retribution that Parliament appears to have intended. It is clear that the Court had considered the provisions of section 18(2) of the Sentencing and Penalties Decree 2009 which make reference to the nature of the offence in deciding on the non-parole period, for the learned Sentencing Judge had been of the view that the Appellant used her position as an employee of the bank to commit the offence and seriously breached the employers trust in the Appellant and thus the sentence imposed by the court should serve as a deterrent to others.

11. The Court of Appeal in **O'Keefe v State**, Criminal Appeal No AAU 0028 of 2007 said:

> *"...Money laundering is clearly potentially a very serious offence. It can be, and is, used to disguise the true nature of money derived from criminal activity and so make it available for legitimate use... that is why Parliament imposed the heavy penalties under the Proceeds of Crime Act..."*

12. Further it cannot be said that fixing a non-parole period is the only manner by which conditions for promotion and facilitation of rehabilitation can be established. Rehabilitation in my view is a part of the duties of the Correction Institute and should be afforded to all inmates. The fact that the non-parole period fixed is one year, does not offend section 18(4) of the Sentencing and Penalties Decree 2009. In my view a Sentencing Judge cannot be faulted for failure to spell out in his Sentencing Order the very wording of the Sentencing and Penalties Decree 2009 as to the purposes for which the sentence was imposed. It suffices so long as it can be gathered from the order. An examination of the mitigating factors spelt out in the Sentencing Order make reference to the age of the Appellant as 34 years, that she is a first offender and the fact that this case has been hanging over her head for 3 ½ years is a punishment itself. This in my view shows that the learned Sentencing Judge had taken into account the matter of rehabilitation of the offender.

13. In view of what has been stated at paragraphs 7, 8, 9, 10, 11 and 12 above I find no merit in ground 1 and therefore dismiss it.

14. An examination of section 24 of the Sentencing and Penalties Decree 2009 becomes necessary as regards the second ground of appeal referred to at paragraph 4(ii) above. Section 24 reads as follows:

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

15. At paragraph 8(c) of the Written Submission filed on behalf of the Appellant to appeal against sentence, it is stated: "From the sentencing remarks paragraph 12(iii), it is clear that the Appellant has been remanded in custody since 1 November, 2012, when she was found guilty as charged (Appeal Book Volume 1, p 36). She was sentenced on the 25 February 2013. This means that she was in remand for 3 months and 25 days in total." The Appellant had placed reliance on the recent judgment of the Supreme Court in **Apakuki Sowane** CAV 0038/2015 to state "that the law required a separate deduction of the period spent on remand from the head sentence but not as part of mitigating factors, unless otherwise ordered by the court. The sentencing remarks does not indicate an order otherwise made by the sentencing Judge."

16. In Apakuki Sowane the majority of the Court of Appeal following the reduction of the charge from murder to manslaughter and in refixing the sentence had substituted for the sentence passed by the learned Trial Judge, a sentence of 12 years imprisonment with a non-parole period of 10 years taking the aggravating and mitigating factors into consideration and stated that the period the Appellant has spent in incarceration shall be counted against the sentence. The Court had not set out the actual sentence to be served, after deducting the period the Appellant had spent in custody and had left it to the Corrections Department to do the calculation. This was the issue that came to be

commented upon by the Supreme Court, as not been correct. The learned Judges of the Supreme Court had stated that "section 24 of the Sentencing and Penalties Decree 2009 does not cast any burden on the Corrections Department. The burden is cast upon the court."

17. The learned Sentencing Judge in the instant case had in his Sentencing Order dated 25th February 2013 set out the mitigating and aggravating factors and stated that the actual sentence will depend on the aggravating and mitigating factors. In setting out the mitigating factors he had at paragraph 12 (iii) of his Sentencing Order stated "You have been in custody since 1st November, 2012, when you were found guilty as charged – that is, a total of approximately 4 months". The learned Sentencing Judge having made additions to aggravating factors and deductions to mitigating factors had arrived at the sentence of 6 years imprisonment. He had deducted a total period of 4 years for the mitigating factors taking into consideration what is stated earlier in this paragraph and the other mitigating factors set out in paragraph 12 above. Thereafter he had made the following orders: "On count No. 1, I sentence you to 6 years imprisonment, with a non-parole period of 5 years imprisonment, effective forthwith. On Count No 2 and 3, I repeat the above process and sentence. All the sentences are concurrent to each other, that is, a total sentence of 6 years imprisonment, with a non-parole period of 5 years imprisonment." Therefore in this case the actual sentence to be served has been clearly spelt out as 5 years and nothing left for the calculation of the Corrections Department. I am of the view that although the learned Sentencing Judge may have fallen into error when he took the period in remand as a mitigating factor instead of taking it as a period of time already served by the offender as mentioned in section 24 of the Sentencing and Penalties Decree 2009, it has not caused any prejudice to the Appellant, as a period of 4 months has been deducted from the sentence. To deduct now a further 3 months and 25 days for the period of time spent in custody from the head sentence as argued by the Appellant would amount to a double deduction.

18. For the reasons stated above, I see no merit in ground 2 of the appeal and therefore dismiss it.

Priyantha Fernando, JA

19. I agree.

The Orders of the Court are:

1. *Appeal against sentence is dismissed.*
2. *Sentence affirmed.*

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Hon. Mr. Justice K. Waidyaratne
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL