IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 104 of 2020
[In the High Court at Lautoka Case No. HAC 153 of 2019]

BETWEEN	**:**	**NACANI TIMO**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**16 August 2023**
Date of Ruling	**:**	**23 October 2023**

RULING

[1] The appellant had been charged with his co-accused and convicted on his own plea in the High Court at Lautoka for aggravated robbery by committing home invasion.

[2] The trial judge had sentenced the appellant (who incidentally had admitted to 16 previous convictions and one pending case against his name) on 30 June 2014 to a sentence of 12 years and 01 month of imprisonment with a non-parole period of 11 years and 06 months (after the remand period was deducted) [see **State v Lockington** [2014] FJHC 484; HAC150.2013 (30 June 2014)]. The appellant appealed to the Court of Appeal and the Court of Appeal on 30 August 2018 dismissed his appeal against conviction and sentence [see **Timo v State** [2018] FJCA 134; AAU88.2014 (30 August 2018)]. The appellant appealed to the Supreme Court and the Supreme Court dismissed his conviction appeal on 25 April 2019 [see **Timo v State** [2019] FJSC 1; CAV0022.2018 (25 April 2019)] and dismissed the sentence appeal but remitted the

matter to the High Court for the limited purpose of hearing the appellant on the question of whether a non-parole period should be fixed in his case and if so, the period and for the High Court to give brief reasons for its decision [see **Timo v State** [2019] FJSC 22; CAV0022.2018 (30 August 2019)].

[3] The High Court on 25 August 2020 resentenced the appellant as directed by the Supreme Court to 12 years and one month of imprisonment with non-parole period of 09 years 09 months and 25 days. The High Court also directed that the appellant's sentence should be operative with effect from the 30 June 2014 [see **State v Timo** - Sentence [2020] FJHC 681; HAC153.2019 (25 August 2020)].

[4] The appellant had once again lodged in person a timely appeal against sentence imposed on 25 August 2020.

[5] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see: **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see: **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide: **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

Sentence Appeal

[7] In what could be regarded as a direct legislative response to **Timo v State** [2019] FJSC 22; CAV0022.2018 (30 August 2019)], the Government introduced on 22 November 2019 amendments to both section 18 of the Sentencing and Penalties Act and section 27 of the Corrections Service Act and the relevant amendments are as follows:

> *"2. Section 27 of (the Act) is amended after subsection (2) by inserting the following new subsections:-*
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> *(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:*
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> *(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)."*

[8] The Supreme Court said in **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023) of the operation of the amendments:

> *'[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….'*

> *[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.'*

[9] The High Court judge had correctly held that in view of the 2019 amendment to section 18 of the Sentencing and Penalties Act, he was bound to impose a non-parole period and only considered the question of the length of the non-parole period (the sentencing judge in any event had no mandate or authority to consider the head sentence itself as the Supreme Court had dismissed the sentence appeal). In doing so, the trial judge once again correctly held as follows:

> *5. 'In setting a non-parole period, the principals identified by the Supreme Court in the case of **Bogidrau v State** [2016] FJSC 5; CAV0031.2015 (21 April 2016) would provide an appropriate guideline. Accordingly; at [6]*
>
> *(i) "[T]he non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. 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].*

[10] Having fully given his mind the above principles, the sentencing judge imposed a non-parole period of 09 years and 09 months and 25 days to the head sentence of 12 years and 01 month of imprisonment imposed earlier and affirmed by the Supreme Court. The gap between the head sentence and non-parole period is over 02 years and 03 months which confirms to the principle relating to the non-parole period enunciated in ***Tora*** and ***Bogidrau***.

[11] The appellant's complaints relate to the non-parole period as he anyway cannot challenge the head sentence. The first complaint is that the Fiji Correction Service (FSC) has added the sentence of 12 years and 01 month of imprisonment imposed with

a non-parole period of 09 years and 09 months and 25 days on 25 August 2020 to the previous sentence of 12 years and 01 month of imprisonment with a non-parole period of 11 years and 06 months. The state counsel has verified with the FSC whether this is the case and has been told that there is no such error made. However, it has come to light that inadvertently the FSC had not updated its records to reflect the appellant's resentence of 12 years and 01 month of imprisonment with the non-parole period of 09 years and 09 months and 25 days imposed on 25 August 2020 instead of the previous sentence. The FSC has undertaken to rectify the same to the state counsel. This court expects the DPP to make sure by way of administrative intervention/advise to the FSC that the appellant's correct sentence namely 12 years and one month of imprisonment with non-parole of 09 years 09 months and 25 days to be effective from the 30 June 2014 is reflected in the records maintained by the FSC.

[12] The appellant also complains that imposing a non-parole period in the absence of a Parole Board is wrong. This is misconceived in that as far as the sentencing judge was concerned he was bound to impose a non-parole period in view of the 2019 amendment to section 18 of the Sentencing and Penalties Act. The existence or otherwise of a Parole Board was beyond his judicial purview.

[13] The appellant also seems to be aggrieved by the fact that despite any remission he earns under section 27 of the Corrections Service Act, he has got to mandatorily serve the non-parole period. Unfortunately for the appellant this is exactly the intention of the Parliament as interpreted by the Supreme Court in **Kreimanis v State** (supra). Section 27 (4) Corrections Service Act states that 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. The Supreme Court said:

> *'[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)]'*

> *[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.*

[14] The appellant orally submitted at the hearing that the sentencing judge had not discounted the pre-trial remand period. However, I find that when the appellant was sentenced on 30 June 2014 the trial judge had indeed discounted 11 months of remand period since 25 July 2013. Therefore, the sentencing judge on 25 August 2020 would have been wrong to afford the appellant a double discount by considering the same period of remand again. In any event, the sentencing judge had no legal authority to consider the head sentence but only the non-parole period as the Supreme Court said in **Timo v State** [2019] FJSC 22; CAV0022.2018 (30 August 2019) on the apellant's sentence appeal that:

> *'[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.'*

[15] There is no sentencing error whatsoever demonstrated by the appellant in his appeal against the sentencing order on the non-parole period made on 25 August 2020 and therefore, all grounds of appeal and the appeal itself is frivolous in the sense of being devoid of merit and having little prospect of success (see **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)].

Order of the Court:

1. Appeal against sentence is dismissed in terms of section 35(2) of the Court of Appeal Act.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL