

IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 30 of 2022

BETWEEN: **LANCE EDWARD GEORGE EMBERSON**

APPELLANT

AND: **THE STATE**

RESPONDENT

For the Appellant: Ms. R. Raj

For the Respondent: Ms. E. Thaggard

Date of Hearing: 14th July 2023

Date of Ruling: 7th August 2023

RULING ON APPEAL

1. This is the ruling on the appeal against sentence. The appeal was out of time however the Court has granted leave to appeal out of time.
2. The Accused was charged with the following offence in the Savusavu Magistrate's Court

CHARGE

Statement of Offence (a)

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence (b)

LANCE EDWARD GEORGE EMBERSON on the 25th day of November 2019 at Savusavu in the Northern Division, without lawful authority, possessed 1417.6 grams of green plant materials an illicit drug known as Indian hemp botanically known as **Cannabis Sativa**.

3. He was first produced in Savusavu Magistrate's Court on the 29th of November 2019 and after securing legal representation with the Legal Aid Commission he pleaded guilty on the 28th of September 2021.
4. On the 14th October 2021 the Learned Magistrate sentenced the Accused to 3 years and 3 months imprisonment, with a non-parole period of 2 years. The Court also made a destruction order with records of the same to be kept in the file. Further the Court directed that the term of imprisonment would commence on the date the Accused was arrested as he was at large at the date of the sentencing.
5. With the Appellant being allowed leave to appeal out of time, he relies on the following grounds of appeal: -
 - (i) **THAT** the learned Trial Magistrate erred in deducting 40 months from 5 years for the early guilty plea. That if 40 months is deducted from 5 years it should come down to 3 years 4 months and not 3 years 6 months.
 - (ii) **THAT** the learned Trial Magistrate further erred when he used the incorrect calculation of 3 years 6 months to deduct 3 months remand period which came to 3 years 3 months instead of 3 years 1 month.
 - (iii) **THAT** the learned Magistrate erred when he failed to consider that there is no Non Parole Board to consider the non-parole period and released the Appellant.
 - (iv) **THAT** the learned Trial Magistrate made an error when he failed to take into account the remission criteria at the Corrections Department that affects the non-parole period imposed.
6. The State has conceded that the Learned Magistrate made a minor mathematical error when deducing the time spent in remand therefore the final sentence should have been 3 years and 1 month, instead of the 3 years 3 months handed down in Savusavu Magistrate's Court.

Appellant's submissions on the remaining Grounds of Appeal

7. The Appellant submits the amendment of section 27 of the Corrections Services Act, which provides as follows: -

“(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 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.”

8. Counsel for the Accused cites the case of Kreimanis –v- State [2023] FJSC 19; CAV 13 of 2020 (29th June 2023) where the Honourable Judge explained how the amendment worked. The Court explained with reference to subsection 27 (4) and said that if the non-parole period and the remission classification is 9 years which is less than 12 years then it is mandatory for the prisoner to serve the non-parole period.
9. The Court went on further to explain section 27 (3) of the Corrections Service Act where say for example the head sentence was 6 years and the non-parole period was 3 years, the early release date after the one third remission is 4 years which exceeds the non-parole period of 3 years. The Court said the prisoner must serve the 4 years sentence.
10. 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 22d 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.
11. The Appellant submit that the Court should reconsider the remand period and re-adjust his sentence to reflect the same. The Appellant also prays that the Court take into account section 27 (3) and (4) of the Correction Services Act and section 18 (2) of the Sentencing and Penalties Act and fix a non-parole period which is the same. By this the Appellant

means that the Court calculates one third remission from the head sentence before fixing a non-parole period. This is to ensure that that the prisoner does not end up serving more than the non-parole period or remission period fixed.

Submissions from the State

12. With respect to the third Ground of Appeal, the Appellant is advancing the contention that the Learned Magistrate erred in imposing a non-parole period when there is no Parole Board in place.
13. The State submits that given the appellant's final sentence arrived at by the Learned Magistrate was more than 2 years, the Learned Magistrate was correct in imposing a non-parole period as stipulated by section 18 (1) of the Sentencing and Penalties Act.
14. The State further submits that section 18 (4) of the Sentencing and Penalties Act specifies that "*Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.*" This essentially means that the non-parole period must be six months below the final sentence or more than 6 months below the final sentence. The Learned Magistrate was generous and went 13 months below the final sentence he ought to have arrived at without the earlier acknowledged error.
15. The State further submits that the section 49 of the Corrections Services Act establishes a Parole Board consisting of independent persons whose function is to make recommendations to the Minister relating to:
 - a) The release on license of any person serving a sentence including a sentence of for life or to recall to prison any person who has been released on license.
 - b) The conditions to apply to any release on license, including a variation or cancellation of any conditions previously applied; and
 - c) Any other matter referred to it by the Minister related to the release on license or the recall of persons previously released; and
 - d) Any other matters prescribed by regulations.
16. The State therefore submits that the Parole Board is established by the above provisions and to now contend that there is no such board in fact in existence, is an issue that needs to be addressed by the Executive. This ground must therefore fail.

17. With respect to Ground Four, the Appellant contends that the Learned Magistrate erred when he failed to consider the remission criteria at the Corrections Department and that in turn affects the non-parole period. The State submits that the Corrections Services Act is a piece of legislation governing an administrative body. The entitlement of the remission period by a convicted person is entirely dependent on the Commissioner of Prison's recommendation to the Minister subject to the prisoner's good behavior. It is an issue entirely out of the jurisdiction of the Courts therefore the Magistrate did not err in law when not taking into consideration the remission period.
18. The State submits that the Supreme Court in Ainars Kremanis –v- State (supra) as cited by the Appellant makes no mention of the Courts having a duty to ensure that the non-parole period imposed is below the one third remission period that may be offered under the Corrections Services Act.
19. The Supreme Court stated: -

“The amendment 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 latter.”
20. The State submits that the final sentence arrived at by the Learned Magistrate, if the mathematical error is taken into account, is well within the established tariff for offences involving possession of Cannabis Sativa.
21. The Appellant was convicted of Unlawful Possession of a total of 1417.6 grams of Cannabis Sativa. The offending falls into Category 3 of drug offenders, with a tariff of 3 to 7 years imprisonment with those possessing less than 2, 500 grams to be sentenced to less than 4 years imprisonment.
22. The Appellant's final sentence is well below 4 years and the non-parole period is even further below the established 4 years.
23. The State therefore submits that the appeal must be refused.

Analysis

24. The State has conceded Grounds 1 and 2 of the appeal therefore the appeal succeeds to that extent.
25. With respect to Ground 3 – the fact that there is no Parole Board in place is, with respect, not the Court’s concern. Instead it is the role of the Executive, more particularly the Minister, to appoint the members of the same as provided for by section 49 of the Corrections Services Act. This is an administrative issue that can be easily rectified with the due appointment of the members of the Parole Board as set out at section 49 (1) of the Act and the Court has no role in this at all.
26. The provisions of section 18 (1) are mandatory – any sentence over 2 years “must” have a non-parole period, which must be at least 6 months less than the term of the sentence (section 18 (4)). The Court has no choice but to impose a non-parole period for any sentence over 2 years and this was the case here as the sentence was 3 years imprisonment.
27. The above provisions are clear in their provisions and effect and the Appellant therefore fails on this ground.
28. For Ground 4 of the appeal, the remission of a sentence handed down by the Courts is within the remit of the Corrections Department. This statutory authority is set out at section 27 (3), (4) and 28 of the Corrections Services Act and Regulations 18 and 19 of the Corrections Services Regulations.
29. The Supreme Court has also set out the proper application of the above provisions in the Kremanis case cited above.
30. The sentence handed down by the Savusavu Magistrate’s Court is well within the tariff and the non-parole period set out by Court was quite generous to the Appellant. This ground of appeal also fails.

This is the Court’s Ruling on this appeal: -

1. **The appeal succeeds to the extent that the sentence handed down on the 14th October 2021 is to be varied as follows – the Appellant is now sentenced to 3 years and 1 month imprisonment with a non-parole period of 2 years backdated to the 14th October 2021.**

2. The other grounds of appeal fail.

So ordered.



Mr. Justice U. Ratuveli

Acting Puisne Judge

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent