

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 020 of 2024**

**BETWEEN** : **TASIR USMAN**  
**Appellant**

**AND** : **STATE**  
**Respondent**

**Counsel** : **Ms K Boseiwaqa for the Appellant**  
**Ms A Lal for the Respondent**

**Hearing** : **27 August & 18 October 2024**

**Judgment** : **31 October 2024**

**JUDGMENT**

[1] Mr. Usman appeals from his sentence. He has been sentenced to 2 years, 8 months imprisonment with a non-parole period of 2 years, 2 months. Mr Usman contends that his non-parole period is too close to his head sentence.

**Background**

[2] Mr Usman pleaded guilty in the Magistrates Court to the three charges against him. According to the prosecution's Summary of Facts, on 28 April 2020 at about 7.25pm Mr. Usman was seen throwing a package inside the grounds of Suva's Remand Center – no doubt the package was intended for certain inmates at the Remand Centre. Upon discovery, Mr Usman fled with his co-offender. The package was retrieved by Corrections officers. The following items were found in the package:

- 46 Fijian tobacco (suki).
- 1 sealed BH20 Ice Burst cigarette.

- 1 small Alcatel mobile phone charger.
  - 1 white charger connector.
  - 1 black cable.
  - 1 phone connector.
  - 1 small broken tube flask containing a small clear white plastic containing white substances believed to be methamphetamine and loose dried leaves believed to be marijuana.
- [3] Mr. Usman was identified on CCTV footage and subsequently arrested. The substances in the flask were tested and confirmed to be 6.4 grams of cannabis sativa and 0.0213 grams of methamphetamine. Mr. Usman and his co-offender were charged with throwing a prohibited article into the Remand Centre (count one). Mr. Usman was also charged with unlawful possession of illicit drugs, being cannabis sativa (count two) and unlawful possession of methamphetamine (count three).
- [4] The charges were filed in the Magistrates Court on 1 May 2020. Mr. Usman was bailed the same day. He subsequently pleaded not guilty on 14 January 2021. A number of trial dates were set down and vacated between 2021 and 2023. On 4 September 2023, Mr. Usman changed his plea to guilty and on 22 September 2023 he was sentenced along with his co-offender.

#### **Sentence by Magistrates Court**

- [5] The learned Magistrate set out the particulars of the offending. It was noted that Mr. Usman had four previous convictions within the last 10 years, two of which were for drug-related offences. The maximum penalty for possession of an illicit drug is a fine not exceeding \$1,000,000 or imprisonment for life or both. The learned Magistrate set out the guideline tariff for possession of cannabis and for possession of methamphetamine. With respect to the latter, the tariff for category one, within which Mr. Usman falls, is between 2½ and 4½ years imprisonment.

- [6] A sentence of 3 months imprisonment and 6 months imprisonment was fixed for counts one and two; being the lesser of the three counts in terms of the likely sentence – the learned Magistrate stated that Mr. Usman’s custodial sentence for the three counts would be served concurrently. The learned Magistrate considered the sentence for count 3, possession of methamphetamine. The starting point was taken as 3½ years imprisonment with an additional 9 months for aggravating factors and a deduction of 3 months for mitigating factors. This resulted in a 48-month sentence which was further reduced by a one-third reduction for Mr Usman’s guilty plea. The result was a sentence of 32 months (2 years and 8 months) imprisonment.
- [7] The learned Magistrate turned to the issue of a non-parole period, identifying the relevant provision under the Sentencing and Penalties Act 2009<sup>1</sup>, and fixing the non-parole period at 2 years and 2 months imprisonment. The following explanation was offered for this period:<sup>2</sup>

*A resounding message must go out to the public that the Court will show no mercy to those who are part of the supply chain of hard drugs in Fiji. Due to the debilitating effects hard drugs have on citizens and the society, drugs do not deserve a place in our country and those who are part of the distribution of these drugs will have to face the full brunt of the law.*

### **Appeal – law and principles**

- [8] This Court’s powers on an appeal are set out at s 256(2). It may confirm, reverse or vary the Magistrates Court’s decision. It may remit the matter back to the Magistrates Court or make such order as it considers just, including exercising any power that the Magistrate might have exercised. It may quash the sentence of the Magistrates Court and impose another sentence warranted in law. Finally, the Court may also receive additional evidence on appeal if considered necessary.<sup>3</sup>

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<sup>1</sup> Section 18.

<sup>2</sup> At 37.

<sup>3</sup> Section 257(1).

- [9] The approach that a court must apply to appeals on sentence was set out as follows by the Supreme Court in *Naisua v State* [2013] FJSC 14 [20 November 2013]:

*It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; [1936] 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal number AAU 0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that trial judge made one of the following errors:*

- i. Acted upon a wrong principle;*
- ii. Allowed extraneous or irrelevant matters to guide or affect him;*
- iii. Mistook the facts;*
- iv. Failed to take into account some relevant consideration.*

- [10] In *Sharma v State* [2015] FJCA 178 (3 December 2015), the Court of Appeal stated at [45]:

*In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.*

## **Decision**

- [11] Mr Usman pursues a narrow issue. He argues that the non-parole period is too close to the head sentence reducing the prospect of any rehabilitation. He argues that the learned Magistrate failed to provide justification for such a sentence.

[12] Pursuant to s 18 of the Sentencing and Penalties Act the court must fix a non-parole period where it sentences an offender to life imprisonment or a term of two years or more. Subsection (4) provides that any non-parole period fixed must be at least six months less than the term of the sentence.

[13] The fixing of a non-parole period under s 18 has been the subject of much judicial comment. Calanchini P stated in *Tora v State* [2015] FJCA 20 (27 February 2015) at [2]:

*The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.*

[14] In *Wabale v State* [2024] FJCA 50 (11 March 2024) Prematilaka RJA noted the observation of Gates J in *Timo v State* [2019] FJSC 22 (30 August 2019) that ‘judicial officers need to justify the imposition of non-parole periods close to the head sentence’.<sup>4</sup> The issue in *Wabale v State*, as with the present appeal, was whether the non-parole period was too close to the head sentence. Mr Wabele was sentenced to 7 years and 8

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<sup>4</sup> Para [11] of *Wabale v State*.

months imprisonment with a non-parole period of 7 years. The Court of Appeal noted that the non-parole period would have a significant impact on Mr Wabale's release date, stating at [15]:

*Although, by itself the non-parole period is legal and in conformity with section 18 (4) of the Sentencing and Penalties Act, since the trial judge does not seem to have considered the principle in Tora as reiterated in Navuda in fixing the non-parole period of zero seven years, I consider it as a sentencing error and allow leave to appeal on that point so that the full court may revisit the non-parole period.*

[15] In the present matter, the learned Magistrate imposed the maximum non-parole period permissible under s 18, it being exactly six months less than the head sentence. The learned Magistrate explained his reasons for doing so, being deterrence of those involved in the distribution of drugs.

[16] The learned Magistrate has acted in accordance with s 18. There is no basis in law for the Court to interfere with the non-parole period. I would go further. In my view, having regard to all the circumstances of the case, the non-parole period here is reasonable. My reasons are these:

- i. The imposition of the maximum permitted non-parole period under s 18(4) does not of itself demonstrate harshness. Where the head sentence is 7 years and the non-parole period is 6.5 years then that could be construed as a harsh non-parole period as the offender would effectively be required to serve about 93% of their actual sentence before being released. However, where, as in the present case, the head sentence is 2 years and 8 months and the non-parole period is 2 years and 2 months then the time served is about 81% of the sentence before release. In *Wabale*, the proportion of time served based on the difference between the non-parole period and the head sentence was 91%. The Court of Appeal stated:

*[14] As pointed out above, the trial judge had considered the non-parole period of 07 years to be appropriate in the rehabilitation of the appellant and just in the circumstances of this case. There is no complaint on the part of the appellant as to the head sentence of 07*

*years and 08 months (92M). If the appellant continues to be of “good behaviour” she will receive 1/3 remission (02 years and 07 months; rounded from 6.67M) and will have been released once she has served two-thirds of the head sentence (05 years and 01month; rounded from 1.33M) which means that she will likely to be released after serving 05 years and 01 month. However, her non-parole will be completed only in 07 years and therefore she will have to serve a term of 07 years mandatorily before her release despite her remission. Thus, the current non-parole period will have a significant impact on her date of release.*

*[15] Although, by itself the non-parole period is legal and in conformity with section 18(4) of the Sentencing and Penalties Act, since the trial judge does not seem to have considered the principle in **Tora** as reiterated in **Navuda** in fixing the non-parole period of 07 years, I consider it as a sentencing error and allow leave to appeal on that point so that the full court may revisit the non-parole period.*

- ii. In my view, the non-parole period of 2 years 2 months was reasonable on the facts of the present case. Mr. Usman’s history of drug offending justified the non-parole period imposed as did his attempts to supply contraband to inmates at the Remand Centre.

## **Orders**

[17] My orders are as follows:

- i. The appeal is dismissed.
- ii. Thirty (30) days to appeal to the Court of Appeal.



**D. K. L. Tuiqerere**  
**JUDGE**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent.