

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No. CAV 0034 of 2015
(Court of Appeal No. AAU 102/2010)

BETWEEN : KILIONI NAITINI

PETITIONER

AND : THE STATE

RESPONDENT

CORAM : Hon. Chief Justice Anthony Gates, President of the Supreme Court
Hon. Mr. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Mr. Justice Brian Keith, Justice of the Supreme Court

COUNSEL : Petitioner in Person
Mr. M. D. Korovou for the Respondent

Date of Hearing : 7 April 2016

Date of Judgment : 22 April 2016

JUDGMENT OF THE COURT

Gates, P

I have read the judgment of Keith J. I agree with it and with the order proposed that the appeal should be dismissed.

Hettige, J

I agree with the reasoning and conclusion in the judgment of Keith J.

Keith, J

Introduction

1. This is another case about the fixing of a non-parole period which a prisoner must serve before a remission of the rest of his sentence can be considered. The petitioner claims that the sentencing judge did not have the power to fix a non-parole period in his case. The Court of Appeal did not consider this argument, and so the Supreme Court is having to consider the issue without the benefit of the view of the Court of Appeal on it. The petitioner is Kiloni Naitini, and I trust that he will forgive me if from now on I refer to him by his family name for convenience.

The facts

2. In the light of the issue which Naitini's appeal raises, it is unnecessary to set out the facts in any detail. In short, on the evening of 13 April 2009, Naitini and three other men were planning to rob a timber yard in Naqelekula. They overpowered the security guard, holding him down and punching him, and then tying him up and putting tape on his mouth, hands and legs. They then went to the tool room, but when they returned to him, they found that he was breathing only with difficulty. They tried to revive him, but they heard a vehicle approaching, so they left him. When they returned, they discovered that he was no longer breathing. They left him again, this time going to the home of the owner of the timber yard. He saw them coming and realised that they were up to no good, so he swung a golf club at them. They pinned him to the ground, tied his arms and legs and taped his mouth. They retrieved the keys to his home from his pocket and ransacked it, taking cash and assorted items worth in excess of \$100,000. The security guard was to die from his injuries.

The sentencing

3. The men were originally charged with murder, tool room breaking, entering and larceny, and robbery with violence. After considering the case with care, the prosecution decided to accept pleas of guilty to manslaughter (contrary to section 198 of the Penal Code) and robbery with violence (contrary to section 293(1)(b) of the Penal Code) from three of the men including Naitini. They were sentenced on 16 October 2010, by which time the Penal Code had been repealed and the Sentencing and Penalties Decree 2009 had been promulgated. Naitini was sentenced to 5 years imprisonment for the offence of manslaughter and to 8 years and 9 months imprisonment for the offence of robbery with violence, those terms to be served concurrently with each other making 8 years and 9 months imprisonment in all. In addition, the sentencing judge fixed a non-parole period in Naitini's case of 6 years.
4. There is some uncertainty about how the judge arrived at the sentence for the offence of robbery with violence. He took 10 years imprisonment as his starting point, and added 5 years imprisonment for what he thought were the aggravating factors. He then referred to what he regarded as the mitigating factors in Naitini's case and said:

"For the above mitigating factors, your early guilty plea and considering your period in remand, I reduce 5 years making total of 9 years imprisonment. You have 14 previous convictions, but they are more than 14 years old, and therefore I will not consider them against you. I give you a discount of 3 months for your good behaviour for last 14 years, making final sentence for the offence of Robbery with Violence to 8 years and 9 months."
5. On one view, the judge got his mathematics wrong. If he intended to reduce Naitini's sentence by 5 years from the starting point of 15 years once the aggravating factors had been taken into account, the resulting term should have been 10 years imprisonment, not 9. But I think that the better view is that the judge did not make so elementary an arithmetical error. Naitini had been on remand in custody for over a year, and what the

judge did, I think, was to reduce the sentence by 5 years to reflect the mitigating factors including, of course, Naitini's pleas of guilty, and then to reduce the sentence by a further year to reflect the time during which he had been on remand in custody.

The grounds of appeal

6. Naitini's original application for leave to appeal to the Court of Appeal did not include the contention that the judge had not had the power to fix a non-parole period in his case. Nor did the written submissions he filed in support of that application. But his submissions did refer to the non-parole period, as did the written submissions of his co-defendants who had also lodged applications for leave to appeal. That affected how the single judge approached the case. When he considered the applications for leave to appeal, he took the view that the case would give the Court of Appeal an opportunity to lay down guidelines for sentencing courts about the length of the non-parole period. Naitini (as well as his co-defendants) were therefore given leave to appeal against their sentences, but the order which the single judge made giving effect to his decision did not limit the leave he was granting to the issue of guidelines relating to the length of the non-parole period. The leave to appeal was unlimited, thereby giving Naitini (and his co-defendants) the opportunity to raise other issues relating to their sentences.
7. In due course, Naitini filed his written submissions in support of what had become his appeal to the Court of Appeal (as opposed to his application for leave to appeal to the Court of Appeal). They included his argument that the judge had not had the power to fix a non-parole period in his case. Indeed, his written submissions referred to most of the statutory provisions on which his argument was based: sections 3(2) and 392(2) of the Crimes Decree 2009, section 61(1) of the Sentencing and Penalties Decree and section 28(1)(j) of the 1997 Constitution. Moreover, almost the whole of the document was devoted to this argument. The Court of Appeal did not address it in its judgment –

no doubt because it was focusing on the reason which the single judge had given for granting leave to appeal. Its judgment helpfully set out some of the principles which previous judgments had established in relation to the non-parole period, and it concluded that it was not appropriate for guidelines for determining the length of the non-parole period to be issued. Instead, the matter was best left to the discretion of individual sentencing judges, albeit acting in conformity with the principles established in previous cases.

8. The Court of Appeal concluded that the length of the non-parole period in Naitini's case was appropriate, and it accordingly dismissed his appeal. Naitini now applies for special leave to appeal to the Supreme Court against his sentence. In his petition and his written submissions in support of it, he maintained his contention that the trial judge had not had the power to fix a non-parole period in his case.

The non-parole period

9. Prior to the promulgation of the Sentencing and Penalties Decree, the power of the court to fix the minimum period which a person sentenced to a term of imprisonment had to serve was governed by section 33 of the Penal Code. It provided:

"Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve."

This provision would have applied to Naitini if he had been sentenced before the repeal of the Penal Code because the offences of manslaughter and robbery with violence were offences for which the maximum term of imprisonment prescribed by the Penal Code was life imprisonment. It is important to note, though, that the court was not *required* to fix a minimum period which an offender had to serve. Section 33 merely gave the court the power to fix such a period.

10. The Penal Code was repealed on 1 February 2010, and that was the date on which the Sentencing and Penalties Decree came into effect. Section 18 of the Sentencing and Penalties Decree created a new regime in its place. Unless the nature of the offence or the past history of the offender made the fixing of a non-parole period inappropriate, the court sentencing an offender to imprisonment for life or for a term of two years or more must fix a non-parole period during which the offender may not be released. 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. At present there is no mechanism in place to enable prisoners to be released on parole: a parole board, or an equivalent body, has not yet been created. That means that the only route by which an offender can currently be released before the expiry of his sentence (known colloquially as “the head sentence”) is by the operation of the current practice relating to remission

Naitini’s ground of appeal

11. The starting point of Naitini’s argument is that he first appeared in court in connection with these proceedings on 28 April 2009. At that time the court’s power to fix a minimum period which an offender had to serve was limited to its powers under section 33 of the Penal Code. Its power to fix a non-parole period under section 18 of the Sentencing and Penalties Decree had not been enacted. However, as I have said, it had been enacted by 16 October 2010 which was the date on which Naitini was sentenced, and the judge was, on the face of it, entitled to fix a non-parole period because of one of the transitional provisions in the Sentencing and Penalties Decree. That is section 61(1) which provides:

“A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of this Decree if no sentence has been imposed on the offender prior to the commencement of this Decree.”

Naitini contends that despite that the court was not permitted to fix a non-parole period in his case. He advanced three reasons for that.

12. First, the court was not permitted to fix a non-parole period in his case because of the double jeopardy provision in section 3(2) of the Crimes Decree, which provides:

"If a person does an act which is punishable under this Decree and is also punishable under another Act or Decree or Promulgation or any other law of the kinds mentioned in sub-section (1), he or she shall not be punished for that act both under that Act or Decree and also under this Decree."

This provision mirrored similar double jeopardy provisions in the Penal Code. Thus, the proviso to section 2 of the Penal Code was in these terms:

"... if a person does an act which is punishable under this Code and is also punishable under another Act or Statute of any of the kinds mentioned in this section, he shall not be punished for that act both under that Act or Statute and also under this Code."

To similar effect was section 20 of the Penal Code which provided, so far as is material for present purposes:

"A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission ..."

Accordingly, Naitini contends that because he was sentenced to terms of imprisonment under the Penal Code, section 3(2) of the Crimes Decree prevented the court from also fixing a non-parole period in his case under the Sentencing and Penalties Decree.

13. Secondly, Naitini relies on section 392(2) of the Crimes Decree which provides:

"When imposing sentences for any offence under the Penal Code which was committed prior to the commencement of this Decree, the court shall apply the penalties prescribed for that offence by the Penal Code."

Naitini did not spell out in so many words what the effect of that provision was on his case, but I assume that his argument is that it was not just that the court could not impose sentences under both the Penal Code and the Sentencing and Penalties Decree. The effect of section 392(2) was that he had to be sentenced under the Penal Code only.

14. Thirdly, Fiji's Constitution when Naitini was sentenced was the 1997 Constitution. Section 28(1)(j) of the 1997 Constitution provided, so far as is material for present purposes:

*"(1) Every person charged with an offence has the right: ...
(j) ... not to be sentenced to a more severe punishment than was applicable when the offence was committed."*

Naitini claims that this constitutional right was infringed in his case. He did not spell out the basis of that contention, but it has to be that the fixing of a non-parole period under the Sentencing and Penalties Decree in his case amounted to "a more severe punishment than was applicable" under the Penal Code.

The analysis of these arguments

15. The first of these arguments has previously been considered and rejected by the Supreme Court. That was in Maya v The State [2015] FJSC 30. Having set out section 61(1) of the Sentencing and Penalties Decree and section 3(2) of the Crimes Decree, the court said at [27]:

" ... the fixing of a non-parole period did not amount to additional punishment of the kind which section 3(2) of the Crimes Decree outlawed. It was the court's attempt to ensure that Maya would not be released from prison earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission."

However, the court noted that it had addressed the issue without the benefit of submissions on the topic from the State, and it was not an issue on which the court had

been addressed by Maya's counsel. In these circumstances, I believe that it would be appropriate to address the issue afresh.

16. The acts which Naitini did (and which were punishable under the Penal Code) were also acts which were punishable under the Crimes Decree. The killing of the security guard amounted to the offence of manslaughter (and therefore punishable) under section 239 of the Crimes Decree. Similarly, the robbery of the owner of the timber yard amounted to the offence of aggravated robbery (and therefore punishable) under section 311 of the Crimes Decree. It follows that the condition for the applicability of section 3(2) of the Crimes Decree as expressed in its opening words was met: Naitini had done acts which were punishable under both the Crimes Decree and the Penal Code. That raises two questions. First, does the fixing of a non-parole period under another enactment – the Sentencing and Penalties Decree – amount to *punishment*, bearing in mind that section 3(2) provides that the offender shall not be “punished” under both the Crimes Decree and the Penal Code? If so, does it amount to punishment under both the Crimes Decree and the Penal Code?
17. I do not think that the fixing of a non-parole period amounts to punishment. The punishment which Naitini got were the two head sentences. The fixing of the non-parole period did not increase those sentences. It only affected when he might be eligible for release by the operation of the current practice relating to remission prior to the expiry of the head sentences, but that did not make the fixing of the non-parole period punishment. That is what the Supreme Court must have had in mind in Maya when it said that the fixing of the non-parole period “was the court’s attempt to ensure that Maya would not be released from prison earlier than the court thought appropriate”. In any event, even if the fixing of the non-parole period could be said to amount to punishment, it is not punishment under either the Crimes Decree or the Penal Code, let alone under both of them. It is punishment provided for by the Sentencing and Penalties Decree.

18. In short, section 3(2) of the Crimes Decree meant that Naitini could not be sentenced twice over for the same crime. In other words, taking the robbery as an example, he could not be sentenced for both the offence of robbery with violence under section 293(1)(b) of the Penal Code as well as for the offence of aggravated robbery under section 311 of the Crimes Decree. Indeed, that is what the proviso to section 2, and section 20, of the Penal Code also prohibited. What they do not prevent is someone in Naitini's position being sentenced for offences under the Penal Code and having a non-parole period fixed at the same time under the Sentencing and Penalties Decree.
19. I turn to Naitini's reliance on section 392(2) of the Crimes Decree. This was a case in which section 392(2) of the Crimes Decree required the court to apply "the penalties prescribed" for Naitini's offences by the Penal Code. Those penalties were the head sentences he received. Assuming that section 392(2) required the court to apply *only* "the penalties prescribed" by the Penal Code, the question is whether the fixing of a non-parole period amounted to a *penalty*. I do not think that it did – for the same reason that it did not amount to *punishment*. The non-parole period did not increase the head sentences. It only affected the date when Naitini might otherwise have been released by the operation of the current practice relating to remission.
20. This also explains why Naitini's reliance on section 28(1) (j) of the 1997 Constitution is misconceived. That section gave Naitini the right not to be sentenced to a more severe *punishment* than was applicable under the Penal Code. For the reasons I have given, I do not think that the fixing of a non-parole period amounted to punishment.

21. I should add two things to all this. First, Naitini also relied on section 29 of the Sentencing and Penalties Decree, which provides:

"Nothing in this Decree affects the power of a court to impose any sentence, penalty on an offender, or to make any other order as a consequence of the finding of guilt against, or conviction of the offender."

I do not see how this provision helps. It is headed "Orders under other Acts", and its purpose, as I read it, was to preserve the court's power to pass sentences or impose penalties which are provided for in other enactments but which are not provided for in the Sentencing and Penalties Decree.

22. Secondly, Naitini's arguments do not take into account the court's power in section 33 of the Penal Code to fix the minimum period an offender had to serve. It is true that the court only had the *power* under section 33 to fix the minimum period for offenders who commit certain offences, whereas it was *obliged* under section 18 of the Sentencing and Penalties Decree to fix a non-parole period for offenders sentenced to imprisonment for life or for a term of two years or more. But that is a distinction without a difference for present purposes. The fact is that even if it could be said that the fixing of a non-parole period amounted to a punishment or a penalty additional to the head sentence, the power to fix a minimum period which the offender had to serve was available to the court both before the repeal of the Penal Code and afterwards.

Conclusion

23. Accordingly, I believe that the Supreme Court came to the correct conclusion on this topic in Maya. However, since the court had the benefit of fuller argument on this occasion, and since the question involves one of general legal importance, I would grant Naitini special leave to appeal. In accordance with the Supreme Court's usual practice, I would treat the hearing of the petition for special leave as the hearing of the appeal, but for the reasons I have endeavoured to give, I would dismiss the appeal.



A handwritten signature in blue ink, appearing to read "Anthony Gates", written over a dotted line.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

A handwritten signature in blue ink, appearing to read "Sathya Hettige", written over a dotted line.

Hon. Mr. Justice Sathya Hettige
Justice of the Supreme Court

A handwritten signature in blue ink, appearing to read "Brian Keith", written over a dotted line.

Hon. Mr. Justice Brian Keith
Justice of the Supreme Court