IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CRIMINAL APPEAL AAU 43 OF 2014
(High Court HAC 183 of 2011 Ltk)

BETWEEN : **JOHN DOUGHTY**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Waqainabete for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **5 July 2016**

Date of Ruling : **28 October 2016**

RULING

[1] This is an application for leave to appeal against conviction and sentence. The Appellant had been charged with one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Decree 2009 (the Decree). The Appellant pleaded not guilty to the charge. Following a trial lasting five days before a Judge sitting with three assessors in the High

Court at Lautoka the Appellant was convicted on the count of rape. On 25 February 2014 he was sentenced to a term of imprisonment of 8 years with a non-parole term of 7 years. The Court also ordered that the Appellant be subject to a permanent domestic violence restraining order in favour of the complainant.

[2] By a handwritten notice dated 16 March 2014 the Appellant indicated his intention to appeal. The notice was subsequently typed by the Corrections Office at the Suva Corrections Centre and dated 27 March 2014. Somewhat confusingly the letter from the Suva Corrections Office addressed to the Court of Appeal Registry and enclosing both the handwritten and typed versions of the Appellant's notice, is dated 24 March 2014. In any event the Court is satisfied that the Appellant had sent his notice of appeal to the Corrections Office within the 30 days prescribed by section 26 of the Court of Appeal Act Cap 12 (the Act). The Appellant cannot control the passage of his notice of appeal once forwarded to the Corrections Office. The appeal is to be considered as a timely appeal. The Legal Aid Commission filed on 30 March 2016 an amended application for leave to appeal against conviction and sentence on behalf of the Appellant.

[3] Pursuant to section 21(1) (b) and (c) of the Act the Appellant requires leave to appeal against both conviction and sentence. The power of the Court to grant leave to appeal may be exercised by a judge of this Court under section 35 (1) of the Act. The question for the Court is whether the Appellant should be granted leave to appeal against conviction and sentence. The test for granting leave to appeal against conviction is whether any of the grounds of appeal raises an arguable error requiring the further consideration of the Court of Appeal. The test for granting leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion. (**Naisua –v- The State** AAU 10 of 2013; 20 November 2013). The grounds of appeal against conviction are:

> *"1. The learned trial Judge erred in law and fact when he did not give **Turnbull** directions on the visual identification evidence led at the trial.*

2. *The learned trial Judge erred in law and in fact when he allowed the Complainant during the trial to identify the Appellant in the witness box without a prior foundation of identity parade or photographic identification."*

[4] The ground of appeal against sentence is:

"The learned sentencing Judge erred in law and in fact by setting a non-parole period that is so close to the head sentence and hence deny or discourage the possibility of rehabilitation."

[5] In relation to ground one, to the extent that identification and not veracity was in issue the directions given by the learned Judge to the assessors and himself in paragraphs 25 and 26 of the summing up provide the necessary caution directions. It is not necessary for a judge to specifically refer to the decision of **R –v- Turnbull** [1977] QB 224 when giving the warning that is required when the prosecution is relying on identification evidence. Furthermore there is no formula that is required to be used when giving those directions. The directions in the summing up provide sufficient compliance and leave is refused on this ground.

[6] In relation to ground 2 it is arguable that there was insufficient basis for permitting dock identification in this case. Leave is granted on this ground.

[7] So far as the appeal against sentence is concerned, the period that is fixed as a non-parole term that must be served before the prisoner is eligible for parole involves the exercise of a discretion by the sentencing court. The Sentencing and Penalties Decree 2009 does not specify what matters should be considered when a sentencing count is determining the non-parole period.

[8] In this appeal it is claimed that the non-parole term of 7 years is too close to the head sentence of 8 years imprisonment. The Appellant relies on the decision of this Court in **Tora –v- The State** (AAU 63 of 2011; 27 February 2015) in support of its submission. The Appellant submits that the non-parole period fixed by the Judge discourages the possibility of re-habilitation. In my opinion it was proper for the learned Judge to

consider that the head sentence was at the lower end of the tariff for the crime of rape. It was also proper to consider the previous criminal record of the Appellant that clearly indicated that deterrence rather than rehabilitation should be the guiding influence when fixing the non-parole term. In this case the Appellant has failed to establish an arguable error in the exercise of the sentencing discretion and leave is refused.

Orders:

1. *Leave to appeal against conviction on ground 1 is refused and on ground 2 is granted.*
2. *Leave to appeal against sentence refused.*

COURT OF APPEAL FIJI

W. Calanchini

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Hon. Mr. Justice W. D. Calanchini

PRESIDENT, COURT OF APPE