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

CRIMINAL APPEAL NO.AAU 0034 of 2018
[High Court of Suva Criminal Case No. HAC 184 of 2012]

BETWEEN	:	**EPINERI LATA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. L. Ratidara for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**22 July 2020**
Date of Ruling	:	**23 July 2020**

RULING

[1] The appellant had been charged along with two others [one of them is the appellant in AAU0118 of 2014 (04 October 2018)] in the High Court of Suva on one count of rape (fifth count in the information) contrary to section 207(2) (a) and (3) of the Crimes Decree No.44 of 2009. The information read as follows.

FIRST COUNT

(Representative Count)

Statement of Offence (a)

UNNATURAL OFFENCE: *Contrary to Section 175 (a) of the Penal Code, Cap 17.*

Particulars of Offence (b)

***ATAMA VEREVOU**, from the 1st day of January 2008 to the 31st day of December 2008 at Rakiraki village, Kadavu, in the Central Division, had carnal knowledge of **SEMISI NACAGILEVU ULUINACEVA** against the order of nature.*

SECOND COUNT

Statement of Offence (a)

***RAPE:**Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence (b)

***ATAMA VEREVOU** from the 1st of January to the 31st of December 2011 at Rakiraki Village, Kadavu, in the Central Division, penetrated the anus of **NETANI BOLACIRI**, a child under the age of 13 years, with a piece of stick.*

THIRD COUNT
(Representative Count)

Statement of Offence (a)

***RAPE:** Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence (b)

***ATAMA VEREVOU** FROM THE 1ST OF December 2011 to the 31st of January 2012 at Rakiraki Village, Kadavu, in the Central Division, penetrated the anus of **NETANI BOLACIRI**, a child under the age of 13 years, with his finger.*

FOURTH COUNT
(Representative Count)

Statement of Offence (a)

***RAPE**: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence (b)

***MINIUSE RARASEA**, from the 5th day of September 2011 to the 2nd day of December 2011 at Rakiraki Village, Kadavu, in the Central Division, penetrated the mouth of **SEMISI NACAGILEVU ULUINACEVA** with his penis, a child under the age of 13 years.*

FIFTH COUNT
(Representative Count)

Statement of Offence (a)

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

EPINERI LATA, from the 1st day of February 2010 to the 17th day of April 2012 at Rakiraki Village, Kadavu, in the Central Division, had carnal knowledge of SEMISI NACAGILEVU ULUINACEVA, a child under the age of 13 years.

[2] After full trial, the assessors had expressed a unanimous opinion of not guilty in respect of the appellant on 06 May 2014. The Learned High Court Judge in the judgment dated 06 May 2014 had disagreed with the assessors and convicted the appellant of the fifth count of rape. He was sentenced on 08 May 2014 to 12 years and 08 months of imprisonment with a non-parole period of 12 years.

[3] The appellant had appealed out of time on 29 March 2018 (received by the CA registry on 20 April 2018) against conviction and sentence. Thereafter, he had filed an application on 04 November 2019 in Form 3 to abandon the appeal against sentence on but changed his mind later and decided proceed with the appeal. Later, Legal Aid Commission appearing for him had tendered an application for enlargement of time to appeal only against sentence accompanied by written submissions on 08 June 2020. However, the appellant has so far not filed an application to abandon his appeal against conviction and the LAC is advised to do so in due course. The State tendered its written submissions on 22 July 2020 at the hearing.

[4] The evidence presented by the prosecution as narrated by the learned High Court judge in the sentencing order is as follows.

> *'[3] The facts elicited at trial are that commencing as long ago as in 2008 several young boys of your village in Kadavu were being sexually abused not only by you but by others as well. In 2008, Verevou you had anal sex with a young boy of 7 years of age, when you were 16. A child of under the age of 13 years is not able in law to consent to full penetrative sex and therefore your act was an unnatural offence as it was called in 2008 (it would be called rape now).*
>
> *[4] In 2011, near the river, you sexually assaulted another boy of 9 years of age with a stick to his buttocks when he was naked after swimming. In the Christmas holidays of 2011/2012 you again assaulted this other boy by using your finger to prod his anus.*
>
> *[5] Miniuse in 2011 you made the first boy who was 10 at the time perform a sexual act on you with his mouth, an act which is now classified as rape in the Crimes Decree. Epineri at some indefinite time you had anal sex with the first boy when he was 9 or 10 years old.*
>
> *[6] All of these acts were performed at isolated places from the village, either by a swimming spot in the river, at the reservoir or in bushes nearby. Each one of you told the young boys not to tell anybody and they tell me that they were frightened.*
>
> *[7] These abominable crimes came to the attention of the authorities when a teacher noticed blood on the chair of the first boy. Enquiries were made and the police were called after the Ministry of Education had been informed.*
>
> *[8] It is extremely sad that these two young boys (and the court has heard of others) were living in a climate of fear and sexual abuse imposed by you, their elders in the village. The accused had no intentions but to seek their own sexual gratification.*

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[6] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*

(i) The reason for the failure to file within time.
(ii) The length of the delay.
(iii) Whether there is a ground of merit justifying the appellate court's consideration.
(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[7] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

The length of the delay

[8] As already pointed out the delay is about 04 years which is very substantial. The appellant had obtained legal representation at the trial in the High Court. The length of the delay is totally unreasonable which alone is sufficient to defeat his appeal.

The reason for the failure to file within time

[9] The reason given by the appellant in his affidavit is that he had misplaced his court documents and sought assistance from his fellow inmates to prepare his appeal. If the appellant had misplaced his documents, how his inmates were able to file an appeal on his behalf is beyond comprehension. The delay had not been due to any reason beyond the appellant's control but rather due to his negligence and cannot be regarded as a justifiable reason for the delay. I think he has not been truthful to this court. He does not deserve to be granted extension of time to appeal out of time on account of this as well.

[10] Regarding a delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J, observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. The court cannot entertain this kind of application*'. I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that *'that the Courts have said time and again that the rules of time*

limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.' This court is not hesitant to take the same view in appropriate cases to ensure that the process of court is not abused and judicial time is not wasted by frivolous and vexatious appeals.

Merits of the appeal

[11] Under the third and fourth factors in ***Kumar***, **test for enlargement of time now is 'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

[12] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal preferred out of time against sentence to be considered arguable there must be a real prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(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.*

[13] Grounds of appeal urged by the appellant are as follows

> *'1. That the Learned Sentencing Judge erred in principle by considering breach of trust in selecting a starting point at the high end of the tariff and using it as an aggravating factor that tantamount to double counting.*
>
> *2. The non-parole period is too close to the head sentence, therefore not affording the Appellant the opportunity for rehabilitation.'*

[14] The appellant's grievance is based on paragraph 20 of the sentencing order.

> *'[20] The rape of this young boy by the second and third accused are acts that will destroy him psychologically for much of his life. The child victim of both counts four and five says in the victim's impact report that he feels immense shame within the village and he has become socially reticent as a result. It is clear that his own development to sexual maturity will be arrested or possibly aberrated. It is an aggravating feature that these two older village boys took advantage of a younger boy of the village and of somebody who should have been taught by example.'*

[15] The learned trial judge had then stated in paragraph 24 as follows.

> *'[24] For the Fifth count I take a starting point of fourteen years, increasing that by one year for the age difference and breach of trust. I deduct one year for the clear record and for his youth, being only 20 years old I deduct a further year meaning the third accused will serve a total sentence of thirteen years. He has already spent 4 months in custody awaiting trial so the total sentence that the third accused will serve is a sentence of 12 years and 8 months. He will serve 12 years before being eligible for parole.'*

[16] In my view, when both paragraphs are read together it is clear that in the last impugned sentence of paragraph 20, the trial judge had merely listed a feature which he later considered as an aggravating factor *i.e.* the reference to the two older village boys taking advantage of a younger boy of the village whom the appellant should have taught by example. The learned trial judge had not itemised aggravating and mitigating features separately anywhere in the sentencing order. On the other hand, the rest of paragraph 20 can be considered as the justification, being the objective seriousness of the offence, for the decision the learned trial judge had taken on the starting point of 14 years in the sentence. Then, in paragraph 24 the trial judge had

increased the sentence by 01 year on account of both the 'age difference' and 'breach of trust'.

[17] Therefore, I do not think that the learned trial judge had taken into account the aggravating feature of breach of trust as part of the starting point.

[18] The appellant has cited **Nadavulevu v State** [2020] FJCA 14; AAU119 of 2015, 115 of 2015 and 129 of 2015 (27 February 2020) in support of his contention. However, a careful reading of the decision in ***Nadavulevu*** makes it clear that the Court of Appeal interfered with the sentence because the trial judge had taken the starting point based on aggravated robbery in the nature of a home invasion in the night and then increased the sentence on account of some aggravating features which had already been considered in setting the sentencing tariff for such aggravated robberies in **Wallace Wise v State** [2015] FJSC 7; CAV0004 of 2015 (24 April 2015). Further, the trial judge had taken into account some objects used by the appellants which were not part of the summary of facts to enhance the sentence.

[19] The learned trial judge in the present case had not committed that kind of error in taking into account 'age difference' and 'breach of trust' in adding one year to the starting point.

[20] The Court of Appeal in **Nadavulevu** went onto state as follows

> '[34] His Lordship Justice Goundar, in ***Laisiasa Koroivuki v State***; [2013] FJCA 15; AAU0018.2010 (05 March 2013), had this to say with approval, on the tariff and the starting point in a sentence:
>
> > *[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
> >
> > *[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or*

middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.'

[21] I have already held that the reference to the two older village boys taking advantage of a younger boy of the village whom the appellant should have taught by example in paragraph 20, cannot be considered as part of the starting point of the sentence. However, the trial judge had picked the starting point of 14 years from the range of tariff for child rape of 10-16 years [vide **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] which is closer to the higher end of the tariff.

[22] In **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) the Supreme Court discussed the 'double counting' in sentencing as follows but decided on a final sentence of 14 years of imprisonment for child rape.

'The application for leave to appeal against sentence

[38] The challenge to the sentence is that the judge unwittingly double-counted some of the aggravating features. The argument runs like this. Having identified the tariff for the rape of a child as 10-16 years' imprisonment, the judge must have reflected some of the features which made this a serious case by taking 12 years as his starting point. That is because he said that one of the factors which had caused him to choose that starting point was "the seriousness surrounded with the circumstances of the offence". He then set out the aggravating factors which caused him to increase the length to 15 years. They were the age of the girl when the abuse began, the breach of trust which the abuse involved, the threats Nadan made to deter her from speaking out, and the impact which the abuse had on her. These were unquestionably all aggravating factors, but the difficulty is that we do not know whether all or any of these aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting.

[39] This illustrates the pitfalls inherent in the mechanistic way judges arrive at an appropriate sentence in Fiji – assigning a particular additional term for any aggravating features and a particular lesser term for any mitigating features. In many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. But the real problem which this case illustrates is the danger of a span of years representing the tariff

without identifying where the judge should start within that tariff for a case without any aggravating or mitigating features. This problem has been highlighted before by the Supreme Court: see ***Seninolokula v The State*** *[2018] FJSC 5 at paras 19 and 20 and* ***Kumar v The State*** *[2018] FJSC 30 at paras 55 and 56.*

[40] Two other things which the Supreme Court said in Kumar at paras 57 and 58 in this context are relevant to the present case:

> *"57. ... First, a common complaint is that a judge has fallen into the trap of 'double-counting', i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *58. Secondly, the lower [end] of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided."*

[41] Seninolokula and Kumar were, of course, decided well after the High Court passed sentence in Nadan's case, and the judge cannot therefore be criticised if he did not heed this advice. The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had therefore fallen into the trap of double-counting, I have considered for myself what the proper sentence in this case should be.

[42] It was, on any view, a bad case of its kind. I have already identified the factors which the judge rightly regarded as aggravating Nadan's offending. In addition there was the fact that there were three separate incidents, and they spanned almost two years. The girl would continually have been in fear with Nadan continuing to live under the same roof. In my opinion, concurrent sentences totaling 14 years' imprisonment for the totality of Nadan's offending would have been appropriate.

[23] Thus, the above Supreme Court decisions seem to signal some departure from ***Koroivuki*** where it was suggested that as a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. According to the

Supreme Court, when the starting point is picked from the middle range of the tariff, the judges can only use those aggravating features of the case which were not taken into account in deciding where the starting point should be as aggravating features to enhance the sentence. However, as the Supreme Court said the difficulty is to know whether all or any of the aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff and if that be the case the judge would be falling into the trap of double-counting and thus, a sentencing error.

[24] The Supreme Court had gone further and stated that judges should not treat as aggravating factors those features of the case which already have been reflected in the tariff itself and that would be another example of 'double-counting', which must, of course, be avoided.

[25] This brings me to the observations made in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) which may help overcome complaints similar to that of the appellant and overcome this quagmire in the sentencing process.

> *'13.....This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence.'.*
>
> *[15] Further, even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question. This is amply demonstrated by the fact that Shameem J adopted a lower starting point but after allowing for the weighting she considered appropriate for matters of aggravation and mitigation reached the same total sentence as the learned Magistrate.'*

[26] The ultimate sentence of 12 years and 08 months is well within the sentencing tariff for child rape and not even close to the higher end. Even if the trial judge had been

guilty of 'double counting' as alleged by the appellant, there is no real prospect of the appellant succeeding in appeal on this ground of appeal with regard to the ultimate sentence.

02nd ground of appeal

[27] The complaint of the appellant is that the non-parole period of 12 years is too close to the head sentence of 12 years and 08 months, thus not affording the appellant the opportunity to rehabilitate. In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal examined a similar argument extensively having considered all previous authorities on this matter and *inter alia* stated as follows.

> *'[89] The Learned Trial Judge while sentencing the Appellant to 17 years imprisonment had fixed the period during which he is not eligible to be released as 16 years in terms of section 18(1) of the Sentencing and Penalties Decree.....'*
>
> *'[90] However, the complaint of the Appellant is that the non-parole period of 16 years has the effect of denying or discouraging the possibility of rehabilitation and is inconsistent with section 4(1) of the Sentencing and Penalties Decree and the decision in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20.'*
>
> *'[114] The Court of Appeal guidelines in **Tora** and **Raogo** affirmed in **Bogidrau** by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[28] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

> *"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[29] However, the arguments based on the calculation of remission *vis-à-vis* the non-parole period and when to fix a non-parole period appropriately have been put to rest by the Corrections Service (Amendment) Act 2019. It states

> *'2. Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*
>
> *"(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.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.".*
>
> *Consequential amendment*
>
> *3. The Sentencing and Penalties Act 2009 is amended by—*
>
> *(a) in section 18—*
> *(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and*
> *(ii) deleting subsection (2); and*
>
> *(b) deleting section 20(3).*

[30] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, 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. In other words, when there is a non-parole period in

operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

[31] The changes introduced by the Corrections Service (Amendment) Act 2019 to the non-parole regime are in accord with the decisions in ***Natini*** and ***Raogo***. However, the amendment has negated the following aspects of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22

> (i) *fixing a non-parole period is quite a drastic power and to make it reasonable, it should be exercised by a Court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. (per Lokur,J)*
>
> (ii) *The power to fix a non-parole period should be exercised by the Courts in exceptional cases and circumstances and where it is absolutely necessary to do so and when that power is exercised it must be preceded by a hearing and supported by reasons. (per Lokur,J)*

[32] Corrections Service (Amendment) Act 2019 on the other hand has affirmed the following direction by the Supreme Court in ***Timo***

> *'The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court and the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period ought to be discontinued forthwith. (per Lokur,J)*

[33] Gates, J remarked in ***Timo*** as follows

> *'(i) judicial officers need to justify the imposition of non-parole periods close to the head sentence, or (ii) indeed for the decision not to impose one at all and (iii) for section 18(1) speaks in terms of "must fix a period..." (per Gates,J)*

[34] Corrections Service (Amendment) Act 2019 has left part (i) of the above observation intact while it has clearly rendered part (ii) irrelevant. The last comment in (iii) on section 18(1) of the Sentencing and Penalties Act 2009 has been affirmed by the amendment.

[35] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 12 years fixed by the trial judge is in compliance with section 18(4). In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> *"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case****."*
>
> *'.... 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'.*

[36] Therefore, I hold that the gap of 08 months between the final sentence and the non-parole period cannot be said to violate any statutory provisions or is obnoxious to the judicial pronouncements on the need to impose a non-parole period.

[37] The appellant's co-accused, Miniuse Rarasea (who had penetrated the victim's mouth as opposed to anal penetration by the appellant) also raised the very same ground of appeal in his appeal against his non-parole period of 13 years out of the sentence of 13 years and 08 months in **Rarasea v State** [2018] FJCA 156; AAU0118.2014 (4 October 2018) where the Court of Appeal said

> *'[48] In the light of the facts as discussed above, I do not consider that this as a fit and proper case where the sentence of imprisonment, particularly the non-parole sentence of 13 years should be interfered with.*
>
> *'[62] In the circumstances, given the totality of the material available to us, I do not think that there are overwhelming reasons why this court should interfere with the non-parole period fixed by the Trial Judge which on the face of it does not offend the provisions in section 18(1) of the Sentencing and Penalties Decree 2009. Therefore, though there were no reasons given for the non-parole period fixed, I do not think that this is a fit case to interfere with the non-parole period of 13 years which in my view has not resulted in a substantial miscarriage of justice.'*

[38] In the circumstances, this ground of appeal too has no real prospect of success.

Prejudice to the respondent

[39] The respondent has not submitted any prejudice that could be caused to its case if extension of time is granted.

[40] Accordingly, enlargement of time is refused.

Order

1. Enlargement of time to appeal against sentence is refused.

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL