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

CRIMINAL APPEAL NO.AAU 044 of 2017
[In the High Court of Labasa Case No. HAC 49 of 2016 Lab]

BETWEEN : **TALAIASI MUALUVU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **26 October 2020**

Date of Ruling : **27 October 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa with one count of Rape contrary to Section 207 (1) (a) and (2)(b) of the Crimes Act, 2009 and one count of Sexual Assault contrary to Section 210 (1) (a) and (b) of the Crimes Act, 2009 committed on 19 December 2014.

[2] The appellant pleaded guilty to the information and the learned High Court judge had stated in the sentencing order dated 03 February 2017 as follows.

> *'2. The accused pleaded guilty for the two counts on his own free will on the 1st of February 2017. Having satisfied that the accused had fully comprehended his plea of guilty and its consequences, I now convict the accused to the offence of rape and sexual assault as charged in the information.*

3. It was revealed by the summery of fact, which you admitted in open court, that the victim is your sister. She is eight years old. You took her to a nearby place beside the road, while you were waiting for your mother with the victim and then removed her undergarment. You then licked and touched her vagina, before inserting your tongue into her vagina. You then told her not to tell the father about this.

[3] On 03 February 2017 the appellant had been sentenced to 10 years and 07 months of imprisonment for rape and 02 years and 07 months of imprisonment on sexual assault with a non-parole period of 09 years; both sentences to run concurrently. The trial judge had also directed that the imprisonment period of ten (10) years and seven (7) months should be served concurrently with the remaining period of the existing imprisonment of the appellant. According to the state, the existing sentence was a sentence of 09 years imprisonment with a non-parole period of 05 years imposed on the appellant by the High Court of Labasa in HAC 29 of 2012 on 14 April 2014 for an offence of rape where the appellant had digitally penetrated the victim.

[4] The appellant in person had signed a timely notice of leave to appeal against sentence on 03 March 2017 (received by the CA registry on 30 March 2017). Amended grounds of appeal against sentence and written submissions had been tendered by the appellant in person on 13 July 2020. The state had responded by its written submission on 04 September 2020. At the hearing the appellant tendered another ground of appeal and submissions on it which the court accepted with the concurrence of the counsel for the state as the appellant was appearing in person and it was felt by the state counsel that he could deal with it orally without filing further submissions.

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and

Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] 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 filed within time to be considered arguable there must be a reasonable 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.*

[7] Grounds of appeal urged on behalf of the appellant are as follows.

Against sentence

Ground 1 - *That the sentencing judge made an error in sentencing principle when the concurrent imprisonment period went over and had a lapse in the final aggregate sentence thus making sentence oppressive.*

Ground 2 - *That the sentencing judge made an error in law by sentencing the appellant when there is no parole board to release the prisoner after the completion of his non-parole period.*

Ground 3- *The learned trial judge while sentencing the appellant to10 years and 07 months of imprisonment had fixed the period of remand during which he is not eligible to be released as 09 years thus acting upon a wrong principle.*

01st ground of appeal

[8] The gist of the appellant's argument seems to be that the trial judge should have made his current sentence operative retrospectively from the date of his previous sentence. It is clear that his previous sentence had commenced from 14 April 2014 (09 years imprisonment with a non-parole period of 05 years) while the current sentence took effect from 03 February 2017 (10 years and 07 months of imprisonment with a non-parole period of 09 years). Therefore, as the current sentence was to run concurrently to the earlier sentence, after serving the previous sentence the appellant would have been left with a part of the current sentence to serve.

[9] Section 22 of the Sentencing and Penalties Act regulates concurrent or consecutive sentences.

> *'22. — (1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.*

[10] The appellant's case does not fall into any of the situations set out in section 22(2) to (6) where the default position on concurrency set out in section 22(1) would not apply. His position does not come under section 22(3) to (6) either where a prisoner may be directed to serve a consecutive sentence instead of a concurrent sentence for the uncompleted sentence of imprisonment. Thus, the trial judge was correct in acting under section 22(1) of the Sentencing and Penalties Act.

[11] Section 22 of the Sentencing and Penalties Act does not vest the sentencing judge with any discretion to make a term of imprisonment imposed on a prisoner be served concurrently and retrospectively on the total existing sentence of imprisonment. Concurrency under section 22 (1) applies only to the uncompleted part of the existing sentence or sentences of imprisonment but not to the entire length of the previous sentence or sentences of imprisonment.

[12] Therefore, this ground of appeal has no merits at all.

02nd ground of appeal

[13] The appellant argues that the trial judge should have given a direction to the Corrections Commissioner in the sentencing order to release the appellant conditionally at the end of the non-parole period as there is no parole board in operation to consider his eligibility for parole at the end of the non-parole period.

[14] Corrections Service (Amendment) Act 2019 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).*

[15] Prior to the promulgation of Corrections Service (Amendment) Act 2019 in the matter of sentence the court had an extremely wide discretion to fix a non-parole period as articulated in paragraph [26] of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22) where the Supreme Court did not recommend any directions by

the trial judge to the Fiji Corrections Service to release the appellant on parole upon completing the non-parole period despite noting that the parole board had not been constituted and not in operation.

[16] 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.

[17] Corrections Service (Amendment) Act 2019 seems to affirm the following direction by the Supreme Court in **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22.

> *'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)*

[18] Therefore, given that the appellant's sentence is 10 years and 07 months, his actual period of imprisonment (assuming that he earns 1/3 remission) appears to be around 07 years and 02 months (not an exact figure) which means that upon completion of the non-parole period of 09 years he could be expected to be released subject to the decision of the Fiji Corrections Service.

[19] While there are no merits in the appellant's submission, his substantive period of sentence to be served appears to be less than the non-parole period. Thus, there is no need for any order by the court for the appellant's release at the end of the non-parole period as the law stands today. In any event, there was no provision in section 18 of the Sentencing and Penalties Act, prior to its amendment by Corrections Service (Amendment) Act 2019 and no such provision is there even thereafter (*i.e.* after the amendment) for the trial court to issue directions to the Fiji Corrections Service as contemplated by the appellant.

[20] This ground of appal has no merits.

03rd ground of appeal

[21] The appellant's argument is that the non-parole period of 09 years is too close to the head sentence of 10 years and 07 months.

[22] 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.'*

[23] 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."*

[24] 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'.*

[25] 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 09 years fixed by the trial judge is in compliance with section 18(4). Therefore, in my view that the gap of 01 year and 07 months between the final sentence and the non-parole period cannot be said to violate any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period.

[26] This ground of appeal too does not have a reasonable prospect pf success.

Order

1. Leave to appeal against sentence is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL