

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO.AAU 0010 of 2014
(High Court Criminal Case No. HAC 151 of 2011)

BETWEEN : **ROHIT PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Fernando, JA

Counsel : **Ms. S. Nasedra for the Appellant**
Mr. S. Babitu for the Respondent

Date of Hearing : **11 September 2018**

Date of Judgment : **04 October 2018**

JUDGMENT

Gamalath, JA

[1] I have read in draft the judgment of Prematilaka, JA and I am in agreement with his reasoning and the conclusions.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on two counts of rape under the Crimes Decree, 2009 (now the Crimes Act, 2009). All offences are alleged to have been committed at Tagitagi, Sigatoka in the Western Division against P (name withheld).

- [3] The first count of rape is under section 207 (2) (a) for having had carnal knowledge of P without her consent between 01 April 2011 and 30 April 2011 and the second count of rape is under section 207 (2) (a) for having had carnal knowledge of P without her consent on 27 July 2011.
- [4] After trial the assessors expressed unanimous opinions that the Appellant was guilty of all counts. The Learned High Court Judge concurred with their opinion and convicted the Appellant in his Judgment on 20 March 2014. On 01 April 2014, the Learned Judge imposed sentences of 12 years and 09 months of imprisonment on both counts to run concurrently with a non-parole period 12 years of imprisonment (*i.e.* the mandatory period to be served before the Appellant becomes eligible for parole) to run from the date of the judgment.

Preliminary observations

- [5] The Appellant had sought leave to appeal, belatedly though, against the conviction on three grounds of appeal and on two grounds of appeal against the sentence. The single Judge of the Court of Appeal had granted enlargement of time and seems to have granted leave to appeal on 15 July 2016 in respect all grounds of appeal except the first ground of appeal against the sentence. The Legal Aid Commission appearing on behalf of the Appellant indicated at the hearing of the appeal that it would rely on the written submissions filed at the leave stage. The State had addressed all the grounds of appeal in its fresh written submissions as well as in the written submissions filed previously.

Grounds of Appeal

- [6] Therefore, the grounds of appeal that would be considered by this Court are as follows.

The grounds of appeal against the conviction are as follows.

Ground 1

'The learned trial Judge erred in law and in fact when he failed to direct the assessors that evidence of recent complaint is not evidence of the facts complained of and cannot be regarded as corroboration but goes to the consistency of the conduct of the complainant with her evidence given at trial.'

Ground 2

'The learned trial Judge erred in law and in fact when he directed the assessors that believing the doctor's evidence meant there was corroboration of sexual intercourse when she had not examined the victim.'

Ground 3

'The Appellant was prejudiced due to lack of legal representation.'

The grounds of appeal against the sentence are

Ground 4

'The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent:

- a. That he did not give enough discount for the Appellant's mitigating factors;*
- b. That the non-parole period is too close to the head sentence resulting in much more severe punishment.'*

Summary of evidence

- [7] The victim had been 13 years old at the time of the incident. The Appellant is her step father and the victim had been living with him and her mother in April 2011 at Sigatoka. On the day of the first incident the victim had been babysitting at home while the Appellant also had been at home complaining of a headache. At about 2.30

p.m. the Appellant had come near her and asked how she was and she had replied in the affirmative. He had then pushed her onto the bed, removed her clothes and taken his clothes off partially and inserted his penis into her vagina. At the time of the act, the Appellant had covered her mouth with his hand and she had been unable to shout. After 10-15 minutes the Appellant had left after threatening her that he would kill her if she were to tell anyone. Though her mother had returned home by 3.30 p.m. the victim had not told her of what had happened as she was frightened.

- [8] On 27 July 2011 the victim had been at home at Rakiraki babysitting at about 2.00 p.m. when the Appellant had asked her to bring him a cup of tea. When she brought tea the Appellant had pushed her onto the bed, removed her clothes and partially his clothes and penetrated her vagina with his penis. The Appellant had covered her mouth with his hand. This episode had lasted for 15-20 minutes and thereafter the Appellant had gone to the garden. The victim's mother and the Appellant's parents had been away in the garden at the time of the incident and returned at about 5.00 p.m. but the victim had not complained to them as the Appellant had threatened to kill her if she would divulge it to anyone. On the following day *i.e.* 28 July 2011 the victim had proceeded to the police station and met witness Vicky on the way. She had told Vicky that her stepfather had raped her and he had taken her in his vehicle to Nalawa police station. She had been taken to hospital on the same day by the police where she had been medically examined.

- [9] The victim had been emphatic in her evidence that there was no consent on her part to both acts of sexual intercourse. The Appellant had cross-examined the victim briefly and suggested that her grandparents had wanted the victim to implicate him and the victim was lying. However, two of the questions and answers put to the victim are worth being quoted.

Q: Can you tell when I raped you which brother was beaten and was asked to go out? Yes, my brother Rishant Chand, this was in Sigatoka.

Q: Did you take your clothes on your own and came to my room and I chased you away? No.'

- [10] Vicky Eliyaz Rafiq had testified to the fact that around 9.00 p.m. on 28 July 2011 while he was on a routine field trip, he had seen a girl of Indian origin running towards the main road and stopped his vehicle and talked to her. Her body language had suggested that she was angry and scared. She had told him that one Rohit Prasad, her step father had raped her on 27 July 2011 and wanted a medical examination done. Vicky had taken her in his vehicle to Nalawa police station and told the police officer there as to what the victim had told him. Vicky had not been cross-examined by the appellant who had defended himself at the trial.
- [11] Dr. Alunita had produced the Medical Examination Form (MEF) of the victim handwritten and signed by Dr. Helan who had gone abroad for employment at the time of the trial. The witness had worked with Dr. Helan for 03 years and could identify the latter's handwriting. According to the MEF, the victim had been examined on 28 July 2011 around 3.30 p.m. at Rakiraki Hospital. There had been no bruises on the body and her hymen had not been intact indicting loss of virginity. No laceration on the vaginal wall or bleeding in the vagina had been observed. Dr. Helan had opined that the victim's was not the first time sexual contact case. Dr. Alunita had said that the impaired hymen could have been caused by penetration of any object or vigorous physical activity such as athletics and the second sexual intercourse could have taken place without leaving any injuries. Under cross-examination the witness had said that the examining doctor had not determined as to when the victim had been raped for the first time.
- [12] The Appellant had elected to give evidence and in his evidence had said that he had been framed by the victim's grandparents. He seems to say that in the first instance he was away from home attending to harvesting while the rest of the family was at home. But he says that he came back and he had a headache and stayed at home till afternoon.
- [13] His position regarding the second incident is that he had asked for a cup of tea from the victim while sleeping in his room and when he got up he had gone to the farm with his mother who had been in a neighbour's house at the relevant time and returned home. He had helped his wife in planting seeds of cabbage at the farm. All of

them had returned home and had dinner together. His father had played music and the victim and her sister had danced where the Appellant had watched and teased them. In the morning of the following day the victim had told her mother that the Appellant had raped her and the mother (Appellant's wife) had confronted him with the said allegation. Then the Appellant had confronted the victim and asked why she had made such a serious allegation and she had replied that he had raped her. Then the appellant had asked her to go and complain to the police.

[14] Under cross-examination, the Appellant had admitted that during both incidents the victim and the Appellant were at home and the victim's mother was away at the farm or garden which was around the house.

[15] Considering the totality of her evidence, Sushila Wati, the Appellant's mother seems to say that the Appellant had been at home without them during a certain period of time after 3.00 p.m. after coming back from the farm. The witness was not sure of any dates. She had admitted that she loved her son and would do anything to protect and save him. The Appellant's father, Narendra also seems to say that on 27 July 2011 he left home to go the farm at 3.00 p.m. and the Appellant was at home. He too had said that he loved her son and would do anything to protect him.

[16] Neither party had sought re-directions at the end of the case though specifically requested by the Learned Trial Judge.

[17] I would now proceed to consider the grounds of appeal.

Ground 1

'The learned trial Judge erred in law and in fact when he failed to direct the assessors that evidence of recent complaint is not evidence of the facts complained of and cannot be regarded as corroboration but goes to the consistency of the conduct of the complainant with her evidence given at trial.'

[18] The relevant paragraphs in the summing up are as follows

'The next witness for the prosecution was Vicky Eliyaz Rafiq. He was on his routine trip to field on 28.7.2011 around 9.00 a.m. with his attendant in his vehicle. At Barotu he had seen an Indian girl wearing a Pink top and Black skirt running towards the main road. As the girl looked scared he had talked to her. This girl was not known to him earlier. She told him that she was raped by her step father Rohit Prasad and she wants her medical done. Thus he had taken this girl to the police station in his vehicle. Accused did not cross examine this witness.'

'This is an independent witness. He corroborates the version of the complainant. If you believe this witness's evidence beyond reasonable doubt there is evidence of recent complaint in respect of the last incident on 27.7.2011.'

[19] It is clear that the Learned High Court Judge had referred to Vicky's evidence as to what the victim had told him as evidence of recent complaint but the Judge had also said that his evidence corroborates the victim's version. It is well settled by many a authority that evidence of recent complaint can never be capable of corroborating the complainant's version and at most it is relevant to the issue of consistency or otherwise of the complainant's conduct *vis-à-vis* her credibility and reliability as a witness (see **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12).

[20] However, this aspect of the summing up had not been brought to the attention of the Learned High Court Judge by either party for a re-direction. I could understand the failure on the part of the Appellant who appeared in person but cannot fathom the silence observed by the prosecutor who, in my view, was performing a quasi-judicial function and had a duty to point this error out to the Trial Judge without allowing a ground of appeal to be raised on this error in the directions. Needless to say that when such grounds of appeal are raised a considerable time of the appellate court has to be spent in dealing with them which the appellate court could otherwise devote to the real issues involved in the culpability or otherwise of an appellant.

- [21] The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.
- [22] However, in my view, when the Appellant has appeared in person reasonable allowance should be accorded for such a failure on his or her part to raise appropriate directions with trial judge to ensure a fair hearing at the hearing of the appeal. I also think that when the appellant has not been defended by a qualified and trained pleader, it is more incumbent upon the prosecuting counsel to be alert and vigilant and point out such misdirections or non-directions to the trial judge not only to ensure a fair trial but also to relieve the appellate courts of the avoidable burden of having to spend valuable time in appeal in considering such alleged errors in the summing up.
- [23] In terms of section 129 of the Crimes Decree 2009 (now Crimes Act 2009) no corroboration of the complainant's evidence, irrespective of the age, is necessary for the accused to be convicted and no warning to the assessors is also required to be given relating to the absence of corroboration. A large body of judicial decisions of the Court of Appeal and the Supreme Court has unequivocally affirmed this position. Therefore, the direction to the assessors that Vicky's evidence corroborates the complainant's version would have had little negative impact on the Appellant as the Trial Judge had also directed that corroboration is to have some independent evidence to support the victim's story and there is no rule for the assessors to look for corroboration of the victim's story to bring home a verdict of guilty in a rape case and the case stands or falls on her testimony. Thus, the assessors may not have treated Vicky's evidence as corroborative of the complainant's version as the source of that evidence as to who raped her came from the complainant herself.

- [24] Therefore, while I am of the opinion that there is merit in the point with the impugned direction of the learned High Court Judge raised under the first ground of appeal and that it should be decided in favour of the appellant, I consider that no substantial miscarriage of justice has occurred and therefore I proceed to apply the proviso to section Section 23 of the Court of Appeal Act and reject the appeal on that ground.

Ground 2

'The learned trial Judge erred in law and in fact when he directed the assessors that believing the doctor's evidence meant there was corroboration of sexual intercourse when she had not examined the victim.'

- [25] The impugned paragraph in the summing up is as follows

'The doctor is an independent witness. If you believe her evidence there is corroboration on sexual intercourse. However, there are no injuries. The doctor is not the person who examined the victim. She was giving evidence on a report prepared by another doctor. Before attaching any weight to this evidence you have to keep these factors in mind

- [26] In the first place the Medical Examination Form had been admitted in evidence without any objection or challenge to its authenticity. Secondly, Dr. Alunita had recognized the handwriting and signature of Dr. Helan who had examined the complainant on 28 July 2011 and prepared the MEF. Dr. Alunita's ability to give evidence on the MEF prepared by Dr. Helan too had not been challenged. Her evidence which had been mostly based on the MEF had not been discredited either. In the circumstances, I think the direction quoted above has no blemish to complaint about. It is a very fair direction.
- [27] The Learned Judge was right when he had told the assessors that if they could believe the doctor's evidence there is corroboration of sexual intercourse as the examination had revealed an impaired (non-intact) hymen and the complainant had been identified as having had sexual intercourse before, for she had already lost virginity. Lack of fresh injuries could be explained by the non-resistance on the part of the complainant and Dr. Alunita had said that the second sexual intercourse could have taken place

without injuries. Thus, the medical evidence certainly provides corroboration on sexual intercourse as spoken to by the complainant.

[28] The Appellant also complains that the Learned Judge's above direction was wrong as the medical evidence had revealed that loss of virginity could also take place due to many reasons other than penetration by a blunt object. However, there was no evidence at all that the complainant had indulged in any vigorous physical activity such as athletics that could have accounted for the loss of virginity and therefore, the Trial Judge was not required to direct the assessors on such a hypothetical possibility .

[29] Therefore, I reject the appeal on the second ground of appeal as well.

Ground 03

'The Appellant was prejudiced due to lack of legal representation.'

[30] The case record reveals that the Appellant had first appeared in the High Court on 05 August 2011 and till 30 July 2012 he had been given time by the court either to retain private counsel or to obtain legal aid. In between he had not been able to retain a private counsel and the Legal Aid Commission had rejected his request and his appeal to appear for him at the trial. On 30 July 2012 the Appellant had informed court that he would represent himself. Yet, the trial proper had commenced on 18 March 2014 where the Appellant had informed court that he was ready for the trial and appeared in person. Thus, effectively the Appellant had been granted more than 02 years and 07 months to make arrangements for legal representation.

[31] No court could wait indefinitely for an accused to find some form of legal representation without proceeding with the trial, for the court has to be mindful of the plight of the victim who is entitled to get on with his or her life as soon as possible without having to recount a very unpleasant and traumatic experience once again in the distant future and the possibility of the non-availability of witnesses with the passage of time etc.

- [32] I am not unmindful of the sentiments expressed by the High Court in **Chand v State** HAC138 of 2005:18 January 2008 [2008] FJHC 9 to the following effect

'The constitutional right to legal representation, albeit not absolute, embodies a realistic recognition of the obvious truth that the average accused does not have the professional legal skill to protect himself or herself when brought before a tribunal with power to take his or her liberty. The accused's right to legal representation is particularly important in an adversary system of criminal justice. The State hires qualified or trained lawyers to prosecute. The accused persons who have money hire best lawyers to defend. The poor accused persons are left to defend themselves. That which is simple, orderly, and necessary to the lawyer – to the untrained laymen – may appear intricate, complex, and mysterious' (emphasis added)

- [33] However, in **Ramalasou v State** AAU0085.2007:28 May 2010 [2010] FJCA 19 the Court of Appeal remarked as follows

'[9] This court has on several occasions explained the practical limits on the right to counsel. The right to counsel is not absolute. Where an accused person is indigent, the right to be provided with representation under the Legal Aid Scheme must depend on the interests of justice. Although, as this Court observed in **Asesela Drotini v. The State** Cr. App. AAU1/05, 24 March 2006:

"It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.

The question for this Court is whether there is a possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial judge and conducted his case competently." (emphasis added)

- [34] It is clear from the case record that the Appellant had been explained the procedure in Hindi at the beginning of the trial and after the examination-in-chief of every witness the evidence had been explained and the Appellant had indicated that he had understood the evidence. At the close of the prosecution case the Learned High Court Judge had explained his rights and the options available to him and the Appellant had elected to give evidence.

[35] Therefore, the guidelines set in Ramalasou and Drotini have been followed in this case adequately to ensure a fair trial and I am of the view that the appellant had not been substantially prejudiced by the lack of legal representation at his trial because on the facts of this case I do not think that the assessors properly directed on how to evaluate the recent compliant evidence would have come to a different finding. I have already decided that the second ground relating to the alleged error in the direction has no merits. I also find that the Appellant's position that he was away from home at the time of the two incidents of rape cannot sustained and carry little credibility in the light of the two questions posed by him to the complainant (quoted above) and his own evidence virtually admitting his presence. His parents' evidence does not carry his case any further. Thus, on the whole there is no merit in this ground of appeal.

[36] Therefore, I reject the appeal on the third ground as well.

Ground 04 (a)

'That the Learned trial judge did not give enough discount for the Appellant's mitigating factors.'

[37] The Learned High Court Judge has taken 11 years as the starting point and added 04 years on account of aggravating factors and then having considered the Appellant's age of 35 years and his having been the sole bread winner of a daughter aged 08 years as mitigating factors and deducted 02 years for the same and arrive at the lead sentence of 13 years. After deducting 03 months of his remand period in terms of section 24 of the Sentencing and Penalties Decree the Trial Judge had arrived at the final sentence of 12 years and 09 months.

[38] Kasim v State AAU 0021 of 1993S: 27 May 1994 [1994] FJCA 25 set the starting point for sentencing an adult in any rape case without aggravating or mitigating features as seven years but added that there are cases where the proper sentence could be substantially higher or lower than the starting point. Drotini v. The State AAU0001 of 2005S: 24 March 2006 [2006] FJCA 26 increased the starting point of cases of rape by fathers or stepfathers to 10 years with substantial increases above the starting point for aggravating factors. The Court of Appeal in Raj v State AAU0038 of 2010: 05 March 2014 [2014] FJCA 18 increased the minimum sentence in rapes of juveniles

(under the age of 18 years) to 10 years and stated that the accepted range of sentences is between 10 and 16 years. The Supreme Court in Raj v. State CAV0003 of 2014:20 August 2014 [2014] FJSC 12) indorsed the Court of Appeal pronouncement and said that the tariff for rape of a child is between 10-16 years imprisonment.

[39] Thus, the Learned High Court Judge has correctly selected 11 years as the starting point. While the Trial Judge's consideration of the fact that the Appellant had been a first offender cannot be faulted, the Appellant's family circumstances should not have been considered as a mitigating factor to attract a reduction of 02 years. To that extent as said by the Court of Appeal in Raj the Appellant had been afforded leniency that he did not deserve. Therefore, there is no merit in the Appellant's complaint of inadequacy of the reduction afforded to mitigating factors by the Trial Judge.

[40] Therefore, I reject the appeal on ground 4(a) of the appeal ground as well.

Ground 04(b)

'That the non-parole period is too close to the head sentence resulting in much more severe punishment.'

[41] The Learned Trial Judge while sentencing the Appellant to 12 years and 09 months imprisonment had fixed the period during which he is not eligible to be released as 12 year in terms of section 18(1) of the Sentencing and Penalties Decree. Section 18(4) 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).

[42] The complaint of the Appellant is that by fixing the non-parole period as 12 years the court had made the sentence imposed more severe. This argument flows from the effect of section 27(2) of the Correction Service Act, 2006 (previously known as Prisons and Corrections Act 2006) which is as follows.

‘Initial classification

27. (1) All convicted prisoners shall be classified in accordance with the procedures prescribed in Commissioners Orders.

(2) For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month.’

[43] Section 28 also deals with remission as follows.

‘Remission of sentence

28. (1) The remission of sentence that is applied at the initial classification shall thereafter be dependent on the good behaviour of the prisoner, and it may be forfeited and then restored, in accordance with Commissioners Orders.

(2) The Minister may grant further remission upon the recommendation of the Commissioner given in accordance with any criteria prescribed by Regulations or the Commissioners Orders.

(3) Procedures for appeal against a decision to forfeit any entitlement to remission may be prescribed by Regulations or Commissioners Orders.’

[44] The argument advanced is that without the non-parole of 12 years the appellant would have been entitled to get one third remission of the head sentence from the Commissioner of Correction Centre subject to good behavior and when the parole period is only 09 months away from the head sentence the Appellant would be able to get a remission only on the balance period of 09 months which is 03 months. Thus, the Appellant will have to compulsorily serve at least 12 years and 06 months of imprisonment. Therefore, the Appellant also argues that the Trial Judge should have given reasons for fixing the non-parole period so close to the head sentence.

[45] The Appellant relies on the decision of the court of Appeal in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20 where the Court of Appeal reduced the non-parole period from 08 years (fixed by the High Court) to 06 years on the following reasoning.

‘[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.

[3] In my view the non-parole term of seven years on a head sentence of 8 years does not promote or facilitate conditions which might assist the re-habilitation of the Appellant. I note that the previous criminal history of the Appellant may lead to the conclusion that the prospect of rehabilitation is unlikely. However even a prisoner with the Appellant's record should not be deprived or denied the chance or the opportunity to re-habilitate himself or to be rehabilitated. Although relatively long as a ratio of the head sentence, a non-parole term of six years represents a balance between re-habilitation and deterrence in this case.’ (emphasis added)

- [46] However, in Singh v State AAU009 of 2013: 30 September 2016 [2016] FJCA 126 without any reference to Tora or section 4(1) of the Sentencing and Penalties Decree 2009 the Court of Appeal had said

‘It is clear from section 18(2) of the Sentencing and Penalties Decree 2009 that the fixing of a non-parole period is at the discretion of the court and not a necessary must. In Natini v State [2015] FJCA 154: AAU102.2010 (3 December 2015) the Court of Appeal said: (emphasis added)

“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.”

And further stated that 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”.

'I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.'

'Further it cannot be said that fixing a non-parole period is the only manner by which conditions for promotion and facilitation of rehabilitation can be established. Rehabilitation in my view is a part of the duties of the Correction Institute and should be afforded to all inmates.'

[47] Therefore, in my view the decision in Singh has not cast any doubt on the reasoning in Tora as to the considerations that should be taken into account when fixing the non-parole period as the former has discussed only section 18(2) and (4) of the Sentencing and Penalties Decree 2009.

[48] The Supreme Court in Kean v State CAV0007 of 2015: 23 October 2015[2015] FJSC 27 where the Court of Appeal had fixed a non-parole period of 13 years to the head sentence of 14 years, made the following observations on section 27(2) and 28(1) of the (then Prisons and Corrections Act 2006 (currently named as Corrections Services Act, 2006) when confronted with a similar challenge to the fixing of a non-parole period by the Court of Appeal which, according to the Appellant, made the sentence more severe. Kean has not referred to Tora or Singh.

'...but in the light of the way the sections have been drafted, it looks as if an offender does not have the legal right to have any part of his sentence remitted. Whether he might have a legitimate expectation that one-third of his sentence would be remitted if he was of "good behaviour" while in prison is another matter.

'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 is not eligible to be released on parole. A number of authorities have held that this provision was not intended to provide for the early release of offenders once they had completed the non-parole period. The non-parole period was intended to be the minimum period which the offender would have to serve. In other words, it was intended to require the court to ensure 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. Having said that, there is, as yet, no Parole Board in place in Fiji to consider the release of prisoners on parole.'

'We can take judicial notice that the current practice is to release the offender once he has served two-thirds of the difference between the primary sentence and the non-parole period.'

'The difficulty with this argument is that it focuses, not on "the prescribed punishment for the offence", but on how the grant of remission works in practice But it is not the prescribed punishment for the offence which has the effect of making the sentence which the Court of Appeal substituted for that of the trial judge more severe than the one which the trial judge passed. It is how the Commissioner calculates remission in cases where a non-parole period has been fixed.'

- [49] The Supreme Court once again in **Bogidrau v State** CAV0031 of 2015: 21 April 2016 [2016] FJSC 5 had to deal with the challenge to a non-parole period of 05 years on the head sentence of 06 years and 06 months, on the basis that that there was insufficient gap between the head sentence and the non-parole period. The observations of the Supreme Court are as follows.

'6. Section 18(4) of the Sentencing and Penalties Decree provided that the non-parole period had to be at least 6 months less than the head sentence, and a number of authorities have addressed how long the non-parole period should be, subject, of course, to that provision. Two principles can be identified:

*(i) "[T]he 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": per Calanchini P in **Tora v The State** [2015] FJCA 20 at [2].*

*(ii) "[T]he 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. It will be wholly ineffective if a minimum sentence finishes prior to the earliest release date if full remission of one third is earned. Experience shows that one third remission is earned in most cases of those sentenced to imprisonment": **Raogo**, *op cit*, at [24].'*

- [50] 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."

[51] The Supreme Court further said in Bogidrau that

'I repeat what I said earlier lest the emphasis I wish to convey is lost. One might have expected the Commissioner's practice to have been to release the prisoner either when he has served two-thirds of his sentence or on the expiry of the non-parole period, whichever is the later. That would reflect both the desirability of encouraging the prisoner's rehabilitation if he has behaved while in prison, as well as the need to reflect the sentencing judge's view of the length of time that the prisoner should actually serve. Many people might say that the Commissioner's current practice does neither. I encourage the Commissioner to review his practice in the light of this judgment.' (emphasis added)

[52] Thus, Bogidrau had adopted the two principles set out in Tora and Raogo with regard to some guidelines in fixing the non-parole period. On the other hand in both Kean and Bogidrau the Supreme Court indicated that it would be desirable for a prisoner aggrieved by the current practice of remission to seek judicial review so that the court could look into its legality because it is not, according to the Supreme Court, how judges fix the non-parole period but how the remission is presently calculated that makes the sentence more severe. Accordingly, the Supreme Court dismissed the appeals in both cases though special leave was granted on the ground of appeal that a non-parole period had been fixed and it had been too close to the head sentence.

[53] In Turogo v State CAV 0040 of 2016: 20 July 2017 [2017] FJSC 17 the Supreme Court had cited Bogidrau with regard to the two principles enunciated in Tora and Raogo i.e. (a) The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation; Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent and (b) minimum term of imprisonment should not be fixed at or less than two thirds of the primary sentence of the Court. The Court had also quoted Singh in relation to the Sentencing and Penalties Decree to the effect that the wording in section 18(1) and 18(2) is not suggestive that the intention of the legislature in enacting that provision had rehabilitation of offenders in mind but it is deterrence and retribution that Parliament appears to have intended. The Supreme Court had also quoted The Queen

v. Radich NZLR 1954 p.86 as follows and finally held that the appellant had not been deprived of rehabilitation by the non-parole period of 09 years out of the head sentence of 13 years.

'On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct, of the individual offender, and the effect of the sentence on this, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.'

- [54] Thus, in my view the decision in **Turogo** does not in any way diminish the impact of **Tora** and **Raogo** as to what matters should be considered when fixing the non-parole period or **Turogo** should not be taken to state that rehabilitation of the offender should not be considered in the matter of fixing the non-parole period. Therefore, I hold that a trial judge dealing with fixing a non-parole period should give due regard to the principles of **Tora** and **Raogo** which were adopted in **Bogidrau** and **Turogo**.
- [55] Therefore, following the above decisions I do not propose to disturb the non-parole period of 12 years fixed by the Learned High Court Judge on the ground that non-parole period had been fixed too close to the head sentence. It appears that the practice of the trial judges so far has been to maintain a gap of 02 years to 06 months between the non-parole period and the head sentence. I cannot conclude that the gap of 09 months in this case would necessarily deprive the Appellant of rehabilitation, who was 35 years of age at the time of the sentence, and prevent him from integrating into the society as a useful citizen after serving the sentence.
- [56] On the other hand in several appeals that came up before this court during this session the same ground of appeal was urged and the counsel informed this court that the same practice of calculating remission still continues. Perhaps, the Commissioner may be of the view that he has few options in giving effect to section 27(2) of the Corrections Service Act 2006 other than deducting one-third of the balance period, as he possibly cannot encroach upon the non-parole period which a prisoner has to mandatorily serve, as that may tantamount to usurping judicial powers. In fact the Court of Appeal in **Raogo** has specifically said that a prisoner whose sentence is fixed by a court cannot be released until the fixed period is served and if a prisoner whose sentence is fixed qualifies for remission, he will be eligible for release only after

serving the fixed period and in such a situation, the remission has to be deducted from the period of imprisonment that was not fixed.

- [57] However, as suggested by the Supreme Court in Bogidrau if the Commissioner adopts the method where the prisoner is released either when he has served two-thirds of his sentence or on the expiry of the non-parole period, whichever comes later, subject of course to his good behavior as stipulated under section 28(1) Corrections Service Act 2006, the current complaints of so many prisoners could be addressed within the existing framework. If not, there will have to be a judicial review or legislative intervention to bring home a satisfactory solution.
- [58] I shall now turn to the Appellant's second argument. He insists that the Learned High Court Judge should have given reasons as to why he had decided to fix the non-parole period at 12 years after sentencing him to 12 years and 09 months. Looking at the case record and the sentencing order it does not appear that the Trial Judge has ascribed any reasons for fixing the non-parole period at 12 years so close to the head sentence. No does it appear that the Appellant had been asked to make any submission on that aspect prior to the sentencing order.
- [59] The pronouncement by the Court of Appeal in Tora appeals to me in dealing with the above contention. For the sake of convenience I shall repeat it.

'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.'

- [60] One would be able to ascertain whether the trial judge had given his mind to section 4(1) of the Sentencing and Penalties Decree 2009 with particular reference to rehabilitation on the one hand and deterrence on the other, only if reasons are set out why a particular non-parole period was fixed in a given case. Such reasons are lacking in the sentencing order of the Trial Judge.

- [61] The following propositions in Administrative Law (11th Edition) by H. W. R. Wade & C. F. Forsyth at pages 440-441 and 443 quoting several judicial pronouncements are applicable, in my view, with equal force to judicial decision making as well.

"The principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions. Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice.....Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so may be deprived of the protection of the law. A right to reasons therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others." (emphasis added)

'The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise..... the presumption should be in favour of giving reasons.'

- [62] It was held in R v. Parole Board, ex p Wilson [1992] QB 740 that a prisoner is entitled to be provided with reason, reports and facts adverse to request for parole, so that he could make representations. Failure to make findings of fact and give reasons amounting to a denial of natural justice (vide R v Burton upon Trent Justices, ex p Hussain (1997) 9 Admin LR 233, 237G-H).

- [63] Another reason that could be adduced as to why a trial judge should give reasons, even briefly, for fixing a certain non-parole period which is particularly very close to the head sentence, is that when vested with a discretion such as conferred by section 18(2) of the Sentencing and Penalties Decree 2009, as to why such discretion was so exercised could only be understood if there are reasons disclosed. Giving reasons would obviously rid the decision making process of any arbitrariness and make it transparent in so far as fixing the non-parole period is concerned.

- [64] Therefore, I am of the view that a trial judge exercising discretionary power under section 18(2) of the Sentencing and Penalties Decree 2009 should ordinarily give reasons for the decision, particularly when non-parole period is fixed very close to the head sentence so as to almost negate the aspect of re-habilitation of an accused in the society. Nevertheless, I would not hesitate to admit that there may be cases where the decision to fix the non-parole period close to the head sentence is fully justified on the facts and circumstances of the case.
- [65] At the same time, it is the duty of an accused to assist the trial judge as to why he deserves a lesser non-parole period and failure to do so may disentitle him from taking up any ground of appeal based on the fixing of the non-parole period.
- [66] Therefore, I think that the Appellant's argument that the Learned High Court Judge has failed to give reasons for fixing 12 years as the non-parole period has merit in as much as the High Court Judge does not appear to have been mindful of the guidance provided by the Court of Appeal in Tora in fixing the non-parole period. Perhaps, the Trial Judge may have entertained good reasons in doing so given that he had cited several decisions where the extreme gravity of similar offences have been expressed by the appellate courts indicating that deterrence had weighed more in his mind than rehabilitation. The Learned Trial Judge was in the best position to evaluate the degree of weight to be attached to deterrence and rehabilitation in this case.
- [67] I remind myself of the strong sentiments expressed by many a decision (for example see Kasim, Drotini, Raj, The State of Punjab vs Gurmit Singh & others 1996 AIR 1393, 1996 SCC (2) 384, Lokesh Mishra v. State of NCT Delhi CRL. A. 768/2010 decided on 12 March 2014 by the High Court of Delhi, Matasavui v State Criminal Appeal No.AAU0036 of 2013: 30 September 2016 [2016] FJCA 118) on ever increasing surge in sexual crimes against children, juveniles, teenagers and adults of both sexes.

[68] In the circumstances, given the totality of the material available to us, I do think that there are overwhelming reasons why the court should interfere with the non-parole period fixed by the Trial Judge which does not offend provisions in section 18(1) of the Sentencing and Penalties Decree 2009. Therefore, while agreeing with the Appellant's contention that 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 12 years.

[69] The facts of the case speak to the extreme gravity of the offences committed by the Appellant on his step daughter. Sentences on such offences should reflect the highest possible degree of deterrence within the law to the prospective offenders who may otherwise be tempted to take advantage of children of tender years, who are most vulnerable to fall prey to them, to satisfy their sexual desires. Sentences on sexual crimes, particularly on children should also reflect the strongest disapproval of the society to such attempts to treat children as 'easy targets', particularly by 'family rapists'.

[70] Therefore, I conclude that the ground 4(b) of the appeal on the sentence should also be rejected.

[71] Therefore, I would conclude that the appeal should stand dismissed and the conviction and sentences be affirmed.

Fernando, JA

[72] I agree with the reasons and conclusions of Prematilaka, JA.

The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction and sentence are affirmed.*



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

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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

Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL