

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

Criminal Appeal No. AAU 0118 of 2014
(High Court Case No. HAC186 of 2013)

BETWEEN : **MINIUSE RARASEA**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Ms. V. Narara for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **12 September 2018**

Date of Judgment : **04 October 2018**

JUDGMENT

Gamalath, JA

- [1] As I understand, the main thrust of the sole ground of appeal revolves around the interpretation of section 18 of the Sentencing and Penalties Act 2009 (CAP 017B), and in order to elaborate on this point I shall now reproduce the ground of appeal along with the relevant portions of the written submissions verbatim.

The Ground of Appeal

[2] The sole ground of appeal states:

“That the Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment.” (Emphasis added)

The following are the relevant portions of the written submission;

“[d] *In this case the Appellant was sentenced to 13 years and 8 months imprisonment with effect from 8 May, 2014 with a non - parole period of 13 years, however, the learned trial Judge did not give any reason for imposing the 13 years non-parole period which is too close to the head sentence. In reality the Appellant without the non-parole period will be able to get a 1/3 remission from the Commissioner of Correction Centre depending upon his good behavior (Section 27(2) of the Corrections Service Act 2006). (Emphasis added).*

[e] *With the non-parole period only 8 months away from the head sentence the Appellant will be able to get a remission on the balance imprisonment of 8 months which means he will have to serve 13 years 5 months for being eligible to be released on good behavior.*

[f] *On the contrary if the sentencing court would not have exercised its discretionary powers under section 18 and have not set any non-parole period, then pursuant to section 27(2) of the Corrections Services Act 2006) and depending on his good behavior, he would have been eligible for 1/3 discount on the head sentence which means a discount of 4 years 6 months. If he kept a good behavior there are high chances of him being eligible for release after serving 8 years 2 months imprisonment.”*

[3] In order to address the issue that has thus been raised, I shall now be focusing on the efficacy of section 18 of the Sentencing and Penalties Act, with a particular emphasis being attached to the exercise involved in setting of “a non-parole period”, as per the provisions contained in section 18 of the Sentencing and Penalties Act.

[4] Before venturing into discussing the ground of appeal I shall first state in brief the facts relating to this appeal;

The victim, SU (name withheld) was a boy aged 10 years, when he was raped by the appellant in his village at Rakiraki, Yale, Kadavu. Although the original indictment preferred by DPP contained two counts of rape against the appellant for having oral and anal sexual intercourse with the victim, later during the course of the proceedings in the High Court, the charge of having anal sexual intercourse has mysteriously disappeared from the indictment due to a fact that is unascertainable through the proceedings. Consequently, the trial against the appellant had proceeded based only on one count of “rape by having oral sexual intercourse”, contrary to Section 207(1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.

[5] Reaching at the end of the trial, the assessors were unanimous in their opinion that the appellant was not guilty of the charge. With the opinion of the assessors, the learned Trial Judge disagreed. Accordingly, he found the appellant guilty as charged.

The Sentence

[6] The sentence imposed was the imprisonment of 13 years and 8 months, with a non-parole (“minimum sentence”) period of 13 years. The learned trial Judge adduced the following reasons in deciding on the quantum of the sentence.

*“The Court of Appeal recently in the case of **Anand Abhay Raj** AAU 0038.2010 (5 March 2014) affirmed that rapes of children will attract*

sentences in the range of 10 to 16 years. The rape of this young boy by the second and third accused (second accused referred to herein is the appellant of this appeal), 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.

The second accused (the appellant) is 26 years and 24 at the time of the offending when the child was eleven. The age difference is an aggravating feature. He is a farmer, from a broken home and raised by his grandmother who is now very old. He has a clear record and is remorseful, I am told. His counsel's request for a suspended sentence is breathtakingly unrealistic as is counsel's suggestion that these offences arose merely out of sexual experimentation. There is no evidence of that whatsoever.

For Count 4 against the second accused, I take a starting point of fourteen years. I increase that by one year for the aggravation of age difference and breach of village trust. I decrease the sentence by one year for his comparative youth, and for his clear record. The second accused's sentence is now fourteen years. I deduct 4 months for the period he has spent in remand awaiting trial meaning that the second accused will serve a total sentence of thirteen years and 8 months. He must serve thirteen years before he is eligible for parole”.

This in effect means that the gap between the primary or head sentence and the minimum or non-parole sentence is merely 6 months.

The analysis of the impugned sentence and the ground of appeal

[7] It is the “six months narrow gap” that has now become the real bone of contention in this appeal. I must state that this indeed is a common issue that keeps coming up like a recurring decimal, almost in every sentencing court, mainly due to the reason that there are no clearly laid down guide line policies or principles to be followed in prescribing non-parole sentences. However, sentencing court acting under section 18(1) of the Sentencing and Penalties Act must consider the setting of a non-parole sentence, whenever the circumstances exist to justify taking that course.

[8] As for me, in relation to the issue in this appeal, one of the best discussions is contained in **Paula Tora v The State**; Criminal Appeal No, AAU 0063/2011, where one could find the following pronouncement;

[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 (Act) as to what matters should be considered when fixing the non- parole period, it is my view that the purpose of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole period should not be so close to the head sentence as to delay 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” per Calanchini P. (emphasis added)

- [9] The issues that came up for determination in **Paula Tora**, had been strikingly similar to the issue in the instant appeal. It is indeed a truism that the narrow gap between the head sentence and the non-parole sentence does impede the effective implementation of the administrative mechanisms such as grant of remission and so on, which are meant to be utilized primarily to “facilitate and promote the rehabilitation of offenders” as contemplated in Section 4(1)(d) of the Sentencing and Penalties Act which states that; *“the only purposes for which sentencing may be imposed by a Court are:...(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated”*.
- [10] In my understanding of the overall purposiveness of the Sentencing and Penalties Act, the primary duty of any sentencing court is to pay heed to the “Sentencing Guidelines” contained in section 4 of the Sentencing and Penalties Act.
- [11] In that context, sections 4(1) and 4(2) of the Sentencing and Penalties Act constitute the bedrock of sentencing guidelines upon which a sentencing court should be constructing a sentence of imprisonment that would address almost every aspect that is needed to be considered in the exercise of specifying a sentence of imprisonment commensurate with the gravity of any offence.

Part 11 of the Sentencing and Penalties Act 2009 act stipulates the Sentencing Guidelines

- [12] Section 4(1) states that: **“The only purposes for which sentencing may be imposed by a court are -**
- (a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
 - (b) to protect the community from offenders;*
 - (c) to deter offenders or other persons from committing offences of the same or similar nature;*
 - (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*

- (e) *to signify that the court and the community denounce the commission of such offences; or*
 - (f) *any combination of these purposes.*
- (2) *In sentencing offenders a court must have regard to —*
- (a) *the maximum penalty prescribed for the offence;*
 - (b) *current sentencing practice and the terms of any applicable guideline judgment;*
 - (c) *the nature and gravity of the particular offence;*
 - (d) *the offender's culpability and degree of responsibility for the offence;*
 - (e) *the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*
 - (f) *whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*
 - (g) *the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*
 - (h) *any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;*
 - (i) *the offender's previous character;*
 - (j) *the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and*
 - (k) *any matter stated in this Decree as being grounds for applying a particular sentencing option.*

The need for cohesion between sections 4 and 18 of the Sentencing and Penalties Act

- [12] The canon of interpretation of statutes states that “Acts should be regarded as a whole”; “it is an elementary rule that construction is to be made of all the parts together and not of one part only by itself”. (Att.Gen. v. Brown [1920] 1K.B. 773,791, *per* Sankey J.,

Minister of Health v Stafford [1952] Ch.730, C.A., Maxwell on Interpretation of Statutes, 11th edition at pg 27). This provides the basis for reiterating the need to adopt a holistic approach in interpreting the provisions of the Sentencing and Penalties Act, and it is in that context the sentencing guidelines as are enshrined in section 4 should be applied in every instance where the sentencing of any offender comes into play. As can be discerned through their language, sections 4(1) and 4(b) do offer a neatly balanced, both conceptual and pragmatic mechanisms, by the application of which a court is assisted in reaching at the appropriate point of a sentence of imprisonment. Applying the guideline principles and policies as contained within the pale of sections 4(1) and 4(2), a sentencing court could create equilibrium, meaning opposing forces are balanced or synchronized, for the purpose of determining a legally justifiable sentence of imprisonment. For instance, as stated in Paula Tora, on the one hand it is the deterrence and retributive aspect and rehabilitation of the offender, on the other hand.

- [13] As regards this, by the extension of logic, I would even go further to state that it is not only the aspects such as retribution, deterrence or rehabilitation that should come into interplay in applying sections 4(1) and 4(2), but also entirety of sentencing guidelines as are laid down in sections 4(1) and 4(2) that should play a pivotal role in providing a sentencing court with necessary tools in determining the appropriateness of a sentence of imprisonment and/or its quantum. As far as the constituent parts of sections 4(1) and 4(2) are concerned, each component plays an equally important role in determining the appropriate sentences of imprisonment and thus is the need to make their application consonant with the operation of the other provisions contained in the Sentencing and Penalties Act.

Section 18 – Fixing of non-parole period by a sentencing court

- [14] Section 18 of the Sentencing and Penalties Act deals with the aspect of “fixing non-parole period” of sentence.

- [15] In examining the efficacy of Section 18 of the Sentencing and Penalties Act, it is clear that the operation of section 18(1) of Sentencing and Penalties Act is conditional upon the operation of section 18(2) of the Act.

Section 18(1) state as follows;

“Subject to sub-section (2), 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” (emphasis added)

- [16] At first blush since it is set in the verb term “must”, an impression could thus be formed to consider that section 18(1) lays down a mandatory requirement to prescribe a non-parole sentence. A close examination of 18(1) would make it clear that it is not a mandatory requirement to prescribe a non –parole sentence in every situation. The language of the section is clear for it states that the operation of 18(1) is subject to the operation of 18(2); in the sense 18(2) is meant to be setting the entry point or the threshold requirement to be fulfilled for the purpose of triggering the operation of the whole section 18 of the Sentencing and Penalties Act. Tuning now to section 18(2) would show that “if a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non parole period inappropriate, the court may decline to fix a non parole period under Sub section (1)”.

- [17] It is clear therefore, that a court that embarks on considering the imposition of a non-parole period should first be guided by the dictates as per the provisions in section 18(2) of Sentencing and Penalties Act. If a court, acting under section 18(2) is of opinion that setting of a non- parole period is inappropriate due to the reasons that should be specified by him, in such situations section 18(1) becomes inoperable.

[18] Under section 18(2), there are two predominant pre-conditions set in place by the legislature to be considered whether or not a non-parole period should be prescribed as per 18(1) and those are;

- (1) the nature of the offence, or
- (2) the past history of the offender.

[19] As can be understood by the plain reading of section 18(2), while one is dealing with a societal centric perspective the other perspective is offender centric. Both are equally important pre-conditions to be taken on board within the pale of implementation of section 18(2). After having scrutinized all the attendant circumstances on an objective basis, a sentencing court must make a well-reasoned decision whether or not to act under section 18(1).

[20] The primacy to be attributed to section 4(1) and 4(2) of the Sentencing and Penalties Act becomes relevant at this juncture. While following a holistic approach, as discussed in the preceding paragraphs that deal with the importance of section 4 of the Sentencing and Penalties Act, a court that embarks on making a determination on the accurate quantum of a sentence of imprisonment should consider the evolvement of the concord amongst the provisions of sections 4(1), 4(2), 18(2) and thereafter 18(1) of the Sentencing and Penalties Act, at this point of confluence of the substratum of the provisions of the Sentencing and Penalties Act.

The need to state the reasons for the decision under section 18 of the Sentencing and Penalties Act

[21] Thus, the decision making process contemplated under section 18(2) followed by 18(1), in the backdrop of the provisions under sections 4(1) and 4(2) should be based on objective, reasonable, rational and non-arbitrary premise. In my opinion a sentencing judge's decision under 18(2) should have a reflection on the record. If the decision has

been not to impose a non-parole period due to the nature of the offence, in such situation the reasons that justify the decision should have some degree of reflection on the record. Similarly, if it is due to the past record of the offender that should also have a reflection on the record. Thirdly, the decision is consequent upon the existence of both factors, (meaning both “nature of the offence and the past record of the offender”) that should also be seen on the record. Fourthly, in a situation where a court is of opinion that a non-parole period should be specified due to any particular reason [as per section 18(1) of the Sentencing and Penalties Act], that should also be reflected on the face of record. The matter does not end there. There should be further reflection of the due regard being paid to the Sentencing Policies, particularly *as per* section 4(1) and 4(2) of the Sentencing and Penalties Act.

The sentencing mechanism involved in the instant appeal

- [22] Based on the proposition I have been seeking to develop hitherto, I now wish to examine the sentencing mechanism adopted by the Learned High Court Judge in the present appeal. On record, apart from the account on the details as regards the manner in which the overall sentence has been arrived at, nothing could be found that reflects the reason for not following the dictates as per section 18 (2) of the Sentencing and Penalties Act. In the context it behooves to ask what were the circumstances under which the learned Judge decided to act under section 18(1) of the Sentencing and Penalties Act? Did the learned Judge at any time consider the application of section 18(2) before he proceeded to prescribe the non-parole sentence of 13 years? If the answer is in the affirmative, what were the reasons adduced to demonstrate that the “the nature of the offence or the past history of the offender did not make it inappropriate to fix the non-parole period.” What were the reasons given to justify the selection of 13 years as the non-parole period? Had the learned Judge considered the operation of the Sentencing Guidelines contained particularly in sections 4(1) and 4(2) of the Sentencing and Penalties Act before prescribing the overall sentence in general and the non-parole sentence in particular? As correctly decided in *Paula Tora*, in prescribing a non-parole period, judges should pay

regard to the need to make provision to “facilitate and promote rehabilitation of offenders” as well. Does the sentencing decision in any way reflect the judicial concern that has been directed at that aspect of the sentencing guidelines? One among other mechanisms available in law to facilitate rehabilitation of offenders is the grant of remission of sentence in accordance with provisions of the Correction Services Act 2006. If the prescribed non-parole period does impede the implementation of the administrative mechanisms in place, which in fact operate as providing incentive for prisoners for being in good behavior, a proof of taking endeavors to rehabilitate themselves or being rehabilitated owing to the mechanism in place administratively, as succinctly stated in Paula Tora, a sentencing court should be mindful of that fact in imposing a sentence. In the instant case has the learned Trial Judge taken that in to consideration in setting the non- parole sentence?

- [23] In relation to the impugned sentence in this appeal, it is necessary to inquire whether the learned Trial Judge had paid sufficient attention to such important aspects of sentencing mechanism, prior to concluding that this is a case where a non-parole period should be prescribed and it should be 13 years imprisonment?. Clearly this part of the judicial exercise has been carried out quite mechanically, without adducing any reasons to justify the decision. Thus, many a question raised above do beg for answers. Having regard to the content on record, I find the questions remain in the same form with little or no answers. In my understanding of the provisions of the Sentencing and Penalties Act, any court that is engaged in deciding on an appropriate sentence of imprisonment should consider the application of section 18(2) of the Act first, and any decision taken based on the said section should have a reflection on the record.

Discretion or Arbitrariness?

- [24] This brings my discussion on the subject to another facet of the subject namely; in deciding on the non-parole period should a sentencing judge give reasons as to why he has arrived at that point?

- [25] Needless to state that judges, generally speaking, do enjoy the exercise of certain degree of discretionary powers which is legally permissible. However, as it is the decided law that no discretion should be exercised in a manner that is seamless and thus transgresses the norms of fairness, reasonableness, and rationality. The process should not be seen as arbitrary.
- [26] In support of this proposition I wish to refer to the thinking of one of the illustrious jurists and the former Lord Chief Justice of England and Wales, Tom Bingham, who has the following to state in the book that he authored "The Rule Of Law";

"The job of judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise discretion, but such discretions are much more closely constrained than is always acknowledged"
"Law not Discretion" Chapter 4, pg 51).

"As in the case of many judicial discretions, a prior judgment must be made which effectively determines how the discretions should be exercised". (ibid pg 53).

"The awarding costs in a civil action in the UK is always said to be in the discretion of the judge. But again it is not a free-ranging discretion. The ordinary rule is that the loser of the action is ordered to pay the reasonable costs incurred by the winner in winning it. Thus an unsuccessful claimant usually pay the defendant's costs: he should not have brought the action. An unsuccessful defendant usually pays the claimant's costs: he should have paid what was due and not defended the action. Not infrequently, the honors of war are shared, and neither side is the clear winner. Then the judge must apportion the costs so as to reflect the parties' respective degrees of success and failure, and may conclude that no order should be made. Exceptionally, a winning party may be denied his costs and, much more often a losing party without means may escape an order to pay them. But the broad principles to be applied

are clear. There is very little room for arbitrariness. (emphasis added) (ibid pg 53)

- [27] As regards the use of discretion in criminal cases the learned jurist has commented as follows;

"It is widely (and rightly) regarded as important that judges should enjoy a measure of discretion when passing sentence on convicted criminals, since if they are obliged to impose a prescribed penalty for a given offence they are unable to take account of the difference between one offence and another and between one offender and another. This makes for injustice, since offences vary widely in gravity, even with offence of the same description, and the circumstances of individual offenders are most infinitely various. Parliament generally recognizes the value of such discretion, and usually lays down a maximum penalty but only rarely a fixed or minimum penalty. It is also, however, a source of injustice or predilection, or whimsy (as in a case reported a number of years ago when a judge told a defendant convicted of a reasonably serious crime that he would ordinarily send him to prison, but would not because it was the judge's birthday). It would also be unjust if the severity of sentencing varied unduly in different parts of the country, a sentencing postcode lottery.

Current arrangements generally preserve the judge's sentencing discretion, but constrain it in three ways. First, sentencing guidelines and Decisions are promulgated which indicate the appropriate range of sentence for different offences, identifying factors which may aggravate or mitigate the offence. Secondly, a defendant sentenced in the Crown Court can seek to appeal against his sentence, and if the Court of Appeal considers the sentence significantly too severe on the particular facts in the light of the guidelines and earlier decisions it will reduce it to an appropriate level. Thirdly, the Attorney General can seek leave to refer a sentence to the Court of Appeal as unduly lenient. Occasional cases had risen in which public opinion was,

rightly, outraged by the inadequacy of sentences passed on convicted defendants, against which the prosecution could not appeal, and this relatively new power was introduced to allow the Court of Appeal, at the instance of the Attorney General, to increase an unduly lenient sentence to an appropriate level. But public and political comment are not a sure guide. Some will recall the public outcry and criticism by the Home Secretary of a sentence imposed in June 2006 on a child kidnapper and abuser named Craig Sweeney. The Attorney General considered the Home Secretary's intervention unhelpful, and did not refer the sentence to the court as unduly lenient. The experienced judge who imposed the sentence had acted in loyal compliance with the scale laid down by the guidelines and earlier decisions. The rule of law does not require that official or judicial decision makers should be deprived of all discretion, but it does not require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered". (Emphasis added)(ibid pg 53)

- [28] The above exposition on law relating to the exercise of judicial discretion by the eminent Jurist has a great relevance to the present discussion. The most pertinent observation, in so far as this appeal is concerned, is that while recognizing that the judges are vested with a certain degree of discretion to be exercised in the decision making process, such exercise is or should not be without constraints. Who or how such constraints should be introduced is entirely a matter coming within the realm of policy making. However, the fact remains that the exercise of judicial exercise cannot be with no checks and balances being introduced into the process.
- [29] This brings me to the issue involved in the fixing of a non-parole period. The question is whether it is imperative for a sentencing judge to adduce reasons to justify the picking of a particular non-parole sentence? In other words, in order to demonstrate that the exercise of fixing a particular non-parole period has not been carried out arbitrarily, should the sentencing judge be adducing reasons?

- [30] The problem that is commonly encountered by criminal courts in the local jurisdiction is not in relation to their endeavor to find out the appropriate tariff for any particular offence. The catalogue of available guideline judicial pronouncements are quite elucidating. However, what has been much left to be desired for is the clear guidance as to how the non-parole period should be prescribed. In my view this process should never be left to become an arbitrary exercise, where there is nothing on record to attribute any reason for the decision of a sentencing judge to pick a particular non- parole sentence.

The present appeal

- [31] Having said above I now wish to turn to the issues involved in the present appeal. The decision of **Paula Tora** went up into the Supreme Court by way of a Criminal Petition; **Paula Tora v The State**; (Criminal Petition No ;CAV 11 of 2015 , (Court of Appeal No.AAU 63 of 2011). Dealing with the main issue involved in the petition, Marsoof J. had stated in paragraph 10 of the judgment that; *“the contention of the petitioner in this application for special leave to appeal is that the non-parole term as varied by the Court of Appeal is too close to the head sentence as to deny or discourage the possibility of the petitioner's rehabilitation. The petitioner has submitted that he has already gone through many rehabilitation courses and programmes in prison and he is now awaiting job placement, and that these developments have enhanced his prospect of integrating into the community. He submits that if his non-parole term is reduced by another year, that will facilitate his eventual restoration to society as a better human being.”*
- [32] Further in his Judgment His Lordship Marsoof J, derived much aspiration from the dicta found in the case of **Maturino Raogo v State**, Criminal Appeal CAV 003 of 2010,(19 August 2010) :
- “In Maturino Raogo v State Criminal Appeal CAV 003 of 2010 (19th August 2010) in which this Court had the opportunity of considering a possible conflict between section 33 of the Penal Code, Cap. 17, as amended in 2003 and section 63(1) of the Prisons Act, Cap. 86, which*

were applicable in that case, and observed as follows in paragraphs 23 and 24:-

"It should be noted that the primary sentence directed to the Prison Service by warrant from the Court remains the sentence of the Court. If there is one offence only that does not involve either concurrency or totality. If the Court is sentencing in respect of a number of offences and/or the prisoner is already serving a sentence or sentences for antecedent convictions, the Court's main task is to reach the appropriate figure for totality and to apply any relevant rules relating to concurrency.

[33] Marsoof J further held in Togo;

"It follows that the sentencing Court can only fix a minimum term of imprisonment equal to or less than the primary sentence of the court based on the considerations stated in the last paragraph. It also follows that the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than the 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." (emphasis added)

"In terms of section 18(1) of the Sentencing and Penalties Decree, a court which sentences an accused for a term of imprisonment exceeding two years, must fix a period during which the offender is not eligible to be released on parole, unless considering the nature of the offence or the past history of the offender, it considers fixing a non-parole period inappropriate. In fixing a non-parole period, the sentencing court must be mindful of the provisions of section 27 of the Corrections Services Act 2006, so as to avoid any conflict".

"It is of course relevant to note that the concept of "minimum term" has now been subsumed in the concept of a "non-parole period" under the Sentencing and Penalties Decree, 2009, but the principles discussed above remain the same and are useful in deciding this case. I can do no better than repeat what was said by this Court in paragraph [30] of its judgment in Raogo's case;

"In any exercise of statutory interpretation the task for the Court is to ascertain the intention of the legislature. In the present case it is clear from the express words used and from the legal framework existing at the time the 2003 amendment to section 33 was enacted, that the legislature wished to provide a power in the sentencing court to ensure that in appropriate serious cases a greater proportion of the primary sentence would actually be served in prison with the consequence that there would be less than one third remission granted. So where imposed, the minimum sentence [or under the present legislation, the non-parole period] that is fixed is an ancillary addition to the primary sentence which is intended to override remission on the primary sentence. 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." (Emphasis added)

- [34] In my understanding the above judgment recognizes the fact that there is tension between the principles relating to the imposition of the non-parole sentence and the exercise of the administrative powers for the purpose of rehabilitating offenders. If the non –parole period is placed at a point which is too close to the primary sentence and if that has been done with no justifiable reasons being adduced, there is no need to emphasize that that would be seen as an arbitrary decision taken impeding the implementation of the guiding

principles, particularly those that are contemplated to be achieved under section 4(1) (d) of the Sentencing and Penalties Degree.

[35] As I have attempted to develop it earlier that the exercise of setting of a non-parole sentence cannot be based on arbitrary and capricious grounds and instead they should reflect that the exercise of the decision making process has been on reasonable, discernible grounds that are justifiable.

[36] Citing another passage from the learned jurist Tom Bingham's "The Rule of Law" would be that ("Law not Discretion" Chapter 4.pg 51);

"What is true of ministers and officials is, generally, true of judges. As was said by Lord Shaw of Dunfermline nearly a century ago , 'To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.(Scott v Scott [1913]AC 417,477).Another senior judge more recently made a similar point; 'And if it comes to the forensic crunch ...it must be law, not discretion, which is in command'.(D-v-National Society for the Prevention of Cruelty to Children [1978] AC 171,239G).The job of the judge is to apply the law ,not to indulge their personal preferences .There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged".

Conclusion

[37] Having reached the finality of this appeal, at this juncture I must state with candor now I am encountered with the most important part of my exercise, namely as to which should be the final outcome in relation to the impugned sentence in this appeal.

- [38] Owing to the fact that there are no guidelines to be followed in prescribing a non-parole sentence as per Section 18(1) of the Sentences and Penalties Act, there is a gray area of law that persists and creates a quandary.
- [39] Harking back the facts of the case briefly one cannot overlook the fact the victim was still a child when he fell prey to the sexual aggression of the Appellant; in his testimony the victim had clearly stated that the Appellant had sexual intercourse with him both orally and anal. Further there is evidence to show through the evidence of the class teacher of the victim that the child was bleeding from his rectum while attending school. This is aggravating circumstance has been disregarded unfortunately by the sentencing Judge.
- [40] In the backdrop of the evidence and applying Anand Abhay Raj, ideally the Appellant's sentence of imprisonment should have been placed at a higher level than 14 years imprisonment.
- [41] However, at this juncture we do not consider it as appropriate for this court to increase the sentence by invoking the provisions of Section 23(3) of the Court of Appeal Act and Rules (Chapter 12). One matter that stands in our way is that no prior notice has been given to the Appellant of such course.
- [42] Therefore I do not wish to interfere with the original head sentence of imprisonment imposed by the learned Trial Judge.

On the Issue of the Non-parole Sentence viz a viz – The Grant of Remission

- [43] Clearly, the existing non-parole sentence of 13 years is standing in the way of activating the administrative mechanism in place such as grant of remission after the completion of one third of the total period of 13 years and 9 months by the Appellant. **That is the main contention involved in this appeal and nothing else.**

- [44] Between these differing positions referred to above, there lies an unclear area as to which course should be taken in relation to the sole ground of appeal.
- [45] In **Paula Tora v The State**; Marsoof J, by adopting the dicta in **Raogo** had stated that the sentencing court should ensure that the non parole sentence should be above the 2/3 of the total period of the sentence imprisonment, so that there can be consonants between the sentencing process and the administrative mechanisms in place to rehabilitate the offenders.
- [46] As I have already discussed in my judgment, the learned Trial Judge had not adduced reasons as to why he considered this as a fit case to refrain from imposing a non-parole sentence. There is an abrupt decision taken by the learned High Court Judge when he decided to place the non-parole sentence at the level of 13 years imprisonment.
- [47] Given the severity of the case, as revealed by the victim in his evidence and applying Section 18(2) of the Sentencing and Penalties Act, I hold that this is not an appropriate case where a minimum sentence should have been prescribed. However, at this juncture, I do not wish to interfere with the original sentence imposed by the learned High Court Judge because apart from the issues created as a result of the persisting confusion with regard to imposition of non-parole period, I do not find any other illegality of the sentence imposed by the learned High Court Judge and I applied the guiding principles laid down in **Anand Abhay Raj** in arriving at this conclusion.
- [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.

Prematilaka, JA

- [49] I have read in draft the judgment of Gamalath, JA and agree with His Lordship's conclusions that the sentence of 13 years and 08 months with the non-parole period of 13 years should be affirmed and the appeal should be dismissed. However, I would respectfully differ from Gamalath, JA's interpretation of section 18 of the Sentencing and Penalties Act. I shall set out my reasons in brief as follows.
- [50] In my view any sentence ranging from 02 years to life imprisonment must necessarily attract a non-parole period by operation of section 18(1) of the Sentencing and Penalties Act unless the nature of the offence and the past history of the offender make fixing of the non-parole period inappropriate and the court declines to fix a non-parole period as permitted by section 18(2). In other words, if the sentence is between 02 years and life imprisonment a non-parole period has to be mandatorily fixed and such a sentence would automatically attract a period during which the offender is not eligible to be released on parole. There is no discretion vested in court in that respect. The use of the word 'must' in section 18(1) expresses that legislative intention in stronger terms than even the word 'shall'.
- [51] 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 which in my view supports the above interpretation placed on section 18(1).

"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."

- [52] Therefore, in my view the phrase '*Subject to sub-section (2)*' in section 18(1) should only be taken to mean that section 18(2) creates an exception to section 18(1). Thus, the rule or the norm is to fix a non-parole period in all sentences from 02 years to life imprisonment and the exception is to decline to do so if the nature of the offence and the past history of the offender make fixing of the non-parole period inappropriate. In other words section 18(2) in effect operates as a proviso to section 18(1). Therefore, section 18(2) comes into play only after the main provision *i.e.* Section 18(1) takes effect but when the former is invoked the latter is overridden or subdued enabling the sentencing judge to avoid imposing a non-parole period.
- [53] I would think that the legislature could have added the words 'However' or 'Provided' at the beginning of section 18(2) to achieve the same result instead of '*Subject to sub-section (2)*' in section 18(1). It appears to have been the choice of the draftsman.
- [54] In contrast, the legislature has made its intention clear by vesting a discretionary power in the court in terms of section 18(3) of the Sentencing and Penalties Act to fix or not to fix a non-parole period if the sentence is less than 02 years and more than 01 year. The intention is expressed by the use of the word 'may'.
- [55] To interpret section 18 (1) and (2) in any other way, in my view would also negate the intention of the legislature in the matter of the requirement of imposing non-parole periods as expressed in Tora and Raogo.
- [56] In Wise v The State CAV 0004 of 2015: 24 April 2015 [2015] FJSC 7 the Supreme Court considered a complaint by a Petitioner that imposing of non-parole period of 05 years upon a head sentence of 07 years was wrong in law and the Chief Justice said as follows:
- '[24] *The penalty for aggravated robbery set by law is 20 years [section 311(1) Crimes Decree]. Having arrived at a sentence of imprisonment within the range for such offences the sentencing court must fix a non-parole period – section*

18(1) of the Sentencing and Penalties Decree. The exercise of the discretion here was unremarkable. ' (emphasis added)

- [57] The above decision in my view affirms the view I have taken on section 18(1) in that a sentencing court must always fix non-parole period if the sentence falls within 02 years and life imprisonment and the discretion lies only in deciding upon the length of that period.
- [58] However, I must add that the sentencing judge should give reasons as to why he or she selects a particular non-parole period *i.e.* the length of the non-parole period. The discretion under section 18(1) is not on whether a non-parole period should be imposed or not but on the length of it. The Court of Appeal in **Rohit Prasad v State** AAU 0010 of 2014: 04 October 2018 dealt with the requirement of sentencing judges giving reasons why they select a particular non-parole period, particularly when it is too close to the head sentence. Moreover, when a particular non-parole period is fixed the sentencing judge should have regard to section 4(1) and (2) of the Sentencing and Penalties Act, in particular 4(1) (a) , (c) and (d) as held by the Court of Appeal in **Tora v State**AAU0063 of 2011:27 February 2015 [2015] FJCA 20. Thus, section 4 of the Sentencing and Penalties Act comes into equation not only in deciding the head sentence but also in fixing the non-parole period.
- [59] Similarly, when a sentencing judge decides to act under section 18(2) and decline to impose a non-parole period he or she must give reasons for exercising the discretion in favour of the accused *vis-à-vis* the nature of the offence and the past history of the offender. The difference is that when the sentencing court acts under section 18(2) it has to consider the nature of the offence and the past history of the offender in addition to the matters under section 4 of the Sentencing and Penalties Act in fixing the head sentence without a non-parole period.

- [60] I am aware 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.
- [61] In my view though the sole ground of appeal raised by the Appellant regarding the wrong exercise of discretion in fixing the non-parole period too close to the head sentence without reasons may come under the criteria adopted by the Court of Appeal in Bae v State; AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 following House v The King [1936] HCA 40; (1936) 55 CLR 499) as a result of the Trial Judge not taking into account relevant considerations under section 4 of the Sentencing and Penalties Decree 2009, I do not think that in this case this Court should act under section 23(3) of the Court of Appeal Act and quash the existing non-parole period and substitute that with a lesser non-parole period.
- [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.

Fernando, JA

- [63] I agree with the reasoning and conclusion of Gamalath JA, that the appeal should be dismissed.

The Orders of the Court are:

1. The Appeal is dismissed.
2. The sentence of imprisonment of 13 years and 8 months with a non-parole period of 13 years is affirmed.



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.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to be "C. Prematilaka".

.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to be "A. Fernando".

.....
Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL