

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 054 OF 2023

BETWEEN: **SETOKI BARI**

Appellant

AND: **THE STATE**

Respondent

Coram: Mataitoga, RJA

Counsel: Fesaitu M [LAC] for Appellant
Uce R for Respondent

Date of Hearing: 31 July 2024

Date of Ruling: 2 August 2024

RULING

1. The appellant [Setoki BARI] is appealing against sentence in this matter. The appellant was charged by the Director of Public Prosecution by filing the following information:

Statement of Offence

RAPE: *Contrary to section 207 (1) and 2 (a) of the Crimes Act, 2009.*

Particulars of Offence

SETOKI BARI, on the 25th day of July, 2019 at Burenitu village, Nalawa, Ra in the Western Division had carnal knowledge of "S.N", without her consent.

2. The trial of the appellant was held at the Lautoka High Court from 14 to 16 March 2003. At the end of the trial, he was found guilty as charged and was convicted.
3. In the Sentence Ruling dated 6 April 2023, the appellant was sentenced to 7 years 6 months and 6 days imprisonment with a non-parole period of 7 years.

Appeal Against Sentence

4. The appellant was not satisfied with his sentence and filed a timely appeal against sentence. There is only 1 ground of appeal against sentence, namely,

"The trial judge erred in principle by fixing a non-parole period too close to the head sentence, denying or discouraging the appellant's possibility of rehabilitation."

5. The appellant's basic submission in support of his ground of appeal against sentence is that pursuant section 4(1)(d) of the Sentencing & Penalties Act CAP 17B, one of the core purposes of sentencing is to establish conditions so that rehabilitation of offenders may be promoted or facilitated.
6. The fixing of a non-parole so close to the head sentence as in this case, according to the appellant frustrates this basic purposes of sentencing. This is wrong in principle and asks this court to allow his leave application so the court of appeal may rectify this wrong.
7. In **Kim Nam Bae v State**¹ the Court of Appeal stated that it would interfere with a sentence if the sentencing judge made one of the following errors:
 - (I) Acted on wrong principle; or
 - (II) Allowed extraneous or irrelevant matters to guide or affect him; or
 - (III) Mistook factors; or
 - (IV) Failed to take into account relevant factors.
8. The appellant's case is that the sentencing judge in this case acted on wrong principle and also allowed extraneous to guide him in making his sentencing decision.
9. In **Bogidrau v State**² the Supreme Court said:

¹ [1999] FJCA 21

² [2016] FJSC 5

"Section 18(4) of the Sentencing and Penalties Decree provided that a 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 period should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation.^[4] 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].*

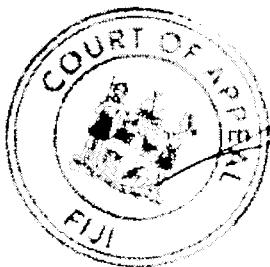
(ii) *'[T]he sentencing Court minded to fix a minimum term of imprisonment [under the provision in the Penal Code equivalent to section 18] should not fix it at or less than two thirds of the primary sentence of the Court. It will be wholly ineffective if a minimum sentence finishes prior to the earliest 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 v The State [2010] FJCA 13 at [24]."*

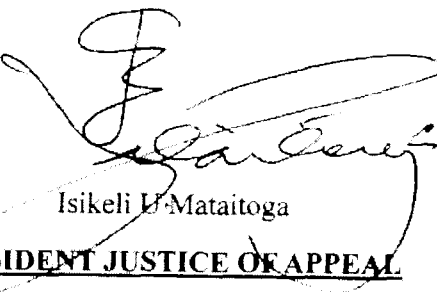
10. I am satisfied that the non-parole period that was set in this case was made in error of relevant legal principles identified in **Tora v State**³.

11. It is also noted that the respondent conceded this appeal ground.

ORDER:

1. Appellant Leave application to appeal against sentence is allowed.




Isikeli U. Maitoga
RESIDENT JUSTICE OF APPEAL

³ [2015] FJCA 20.