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

CRIMINAL APPEAL AAU 84 OF 2012
(High Court HAC 7 of 2012 at Labasa)

BETWEEN : **VILIAME TOMASI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Appellant in person**
Mr R Kumar for the Respondent

Date of Hearing : **11 July 2018**

Date of Ruling : **30 August 2018**

RULING

[1] The appellant was convicted on his plea of guilty on four (4) counts of rape. On 21 September 2012 he was sentenced to 15 years imprisonment on each count to be served concurrently with a non-parole term of 13 years.

[2] This is his timely application for leave to appeal sentence under section 21(1) (c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court power to grant leave. The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] The appellant's grounds of appeal against sentence are:

> *"1. The learned sentencing judge erred when he failed to deduct the one third of the final sentence for the early guilty plea thus resulting in a miscarriage of justice and prejudice to the appellant.*
>
> *2. My right to one third remission of sentence under the Corrections Act 2006 cannot be entertained due to the non-parole period imposed by the learned sentencing judge resulting in a harsh and excessive sentence and prejudice to the appellant."*

[4] The following summary of the facts was submitted by the respondent at the trial and was outlined by the learned Judge in his sentencing decision. The complainant was the biological daughter of the appellant. She was born on 26 June 1998 and was aged between 11 and 13 years old on the various dates when the offences were committed. The appellant was married at the relevant time with four young children including the complainant. In relation to counts 1, 2, and 3 the appellant had unlawful sexual intercourse with the complainant in his bedroom in the family residence. The appellant's wife and other children were not home at the time. Because the complainant was under 13 years old in counts 1, 2, and 3 she was incapable of giving her consent as a matter of law. The trial judge added that in any event the complainant did not consent and that the appellant well knew she was not consenting to sex at the time. The appellant admitted count 4.

[5] The first ground of appeal is concerned with the discount for the plea of guilty. The trial judge has grouped as mitigating facts character, co-operation, guilty plea and time in remand together. This practice does make it difficult for an appellate court to determine whether there has been an arguable error in the sentencing discretion. Certainly the

practice is not consistent with section 24 of the Sentencing and Penalties Act 2009 which requires a sentencing court to regard time spent in remand as time already served. That is not a matter that should be regarded as mitigation. It is arguable that the proper discount for the early plea of guilty was not afforded to the appellant. Leave is given on this ground.

[6] Ground 2 is concerned with the remission to which a serving prisoner may receive. That is a matter for the Corrections Department under the Corrections Service Act 2006. It is matter for the executive branch of Government. It is not a matter that is relevant to the fixing of any non-parole period under section 18 of the Sentencing and Penalties Act. This ground is not arguable and leave is refused.

Orders:

1. *Leave to appeal on ground 1 is granted.*
2. *Leave to appeal on ground 2 is refused.*

W. Calanchini

Hon Mr Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL