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

CRIMINAL APPEAL NO.AAU 131 of 2015
High Court Criminal Case No. HAC 242 of 2013]

BETWEEN	:	**SENIJIELI WAQANITUVA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Chandra, RJA**
Counsel	:	**Ms. S Ratu for the Appellant** **Ms. P Madanavosa for the Respondent**
Date of Hearing	:	**11 September, 2018**
Date of Ruling	:	**4 December 2018**

RULING

[1] The Appellant was charged with one count of Rape contrary to section 207(1)(2)(a) of the Crimes Act, 2009.

[2] After trial the Appellant was convicted on 9th October 2015 and sentenced on 16th October 2015 to a term of 10 years and 9 months imprisonment with a non-parole period of 9 years.

[3] The Appellant filed a timely notice of appeal setting out the following grounds of appeal:

> *"(i) The learned Judge erred in law when he failed to direct the Assessors about the following in respect of the legal principle of alibi:*
>
> *a. Firstly it was a misdirection because the defence relied on mistaken identity and not Alibi, thus the direction on alibi could have confused the assessors.*
>
> *b. That the prosecution must disprove the defence of alibi beyond reasonable doubt; and*
>
> *c. Even if the assessors concluded that the defence was false that does not itself entitle them to convict the Petitioner.*
>
> *(ii) The learned trial Judge erred in law and in fact when he failed to direct the assessors regarding the manner in which they should draw inference when reaching their verdict.*
>
> *(iii) The learned trial Judge when he imposed a non-parole which was too close to the head sentence that consequently offended against the remission as allowed in the Prisons and Corrections Act, 2006."*

[4] The Appellant had been at the victim's home in the night when her parents were away and he had called her to the room. Her grandmother and her sisters had been sleeping in the sitting room. When the victim refused to come the Appellant had repeatedly caller her. Then when she had gone to the room, he had pestered her to remove her clothes and inserted his finger into her vagina. The victim was 11 years old at the time of the rape.

[5] The Assessors opined unanimously that the Appellant was guilty and the learned trial Judge concurred with that opinion, found the Appellant guilty and convicted him. On 16th October 2015 the Appellant was sentenced to 10 years and 9 months imprisonment with a non-parole period of 9 years.

[6] The 1st ground of appeal is regarding the mentioning by the trial Judge in his summing up soon after paragraph [48] and before paragraph [49] – "May I also direct you on the law on defence of alibi".

[7] According to the transcript it appears that the learned Judge however, did not state anything else on the defence of alibi in his summing up. The Appellant had not taken up the defence of alibi and his position was one of denial of the charge. The Appellant had also alleged that there had been a mistaken identity by the victim.

[8] At the end of the summing up, there appears to be no request by the defence for a re-direction if the defence had realized that there was no direction on alibi.

[9] In the above circumstances, the question for consideration is whether there was prejudice caused to the Appellant as a result of the learned trial Judge mentioning about the defence of alibi in his summing up but not explaining how it should be considered.

[10] On the other hand the learned Judge had dealt with identification in great detail in his summing up where the defence was relying on regarding mistaken identity.

[11] In those circumstances, I would not consider this ground to be arguable.

[12] The second ground of appeal is the inadequacy in the summing up regarding drawing of inferences when reaching their verdict.

[13] It would seem that the State and the defence had taken two different approaches in the case. The prosecution relied on the complainant's evidence regarding identification while the defence took up the position that the complainant was mistaken in identifying the appellant as the perpetrator.

[14] The learned trial Judge in his summing up stated that the defence was relying on the position that the complainant had made a mistake in identifying the appellant. He further directed that the assessors should consider all the evidence in deciding whether the complainant was truthful.

[15] The Appellant gave evidence and denied the charge. The learned trial Judge had not specifically warn the assessors as to how they should draw inferences regarding the contradicting version of events.

[16] In the above circumstances it may be necessary to consider the evidence led at the trial in its entirety to consider this ground of appeal and I would grant leave as it is arguable that there was prejudice caused to the appellant.

[17] The third ground of appeal is against sentence to the effect that the non-parole period set by the learned trial Judge is too close to the head sentence and that offended against the remission as allowed in the Prisons and Corrections Act, 2006.

[18] The Appellant was sentenced to a term of 10 years and 9 months with a non-parole period of 9 years.

[19] In terms of Section 18(4) of the Sentencing and Penalties Act, 2009 when the Court fixed a non-parole period, it must be at least 6 months less than the term of the sentence.

[20] In the present case the fixing of the non-parole period was in keeping with s. 18(4) and therefore there was no error.

[21] The fixing of the non-parole period is left to the discretion of the sentencing judge. Section 18(4) lays down the minimum difference between the head sentence and the non-parole period as six months. However, as to whether how much more than six months the non-parole period should be is left to the discretion of the sentencing judge.

[22] The remission granted by the Prisons and Corrections Act, 2006 is an administrative act. The sentencing judge is not required to consider the effect of remissions that would be granted under that Act and his role is quite independent of the administrative machinery under the said Act.

[23] In recent times, arguments have been raised as to whether the prisoners' prospects for rehabilitation should be considered in fixing the non-parole period. There have been no guidelines on this aspect. In **Chirk King Yam v. State** Criminal Appeal AAU0095 of 2011 (27 February 2015) where the sentence imposed by the High Court was 6 years

imprisonment with a non-parole period of 5 years, the Court of Appeal stated that the non-parole term of 5 years was too close to the head sentence of 6 years and reduced the term of non-parole to 4 years.

[24] In the present case the difference between the head sentence and the non-parole term is one year and nine months which can be argued as being too close to the head sentence in view of the decision in **Chirk King Yam** (supra), and therefore leave is granted on the third ground as well.

Orders of Court:

(1) Leave to appeal against conviction is granted on the first ground of appeal against conviction.

(2) Leave to appeal is granted on the ground of appeal against sentence.

Hon. Justice Suresh Chandra
JUSTICE OF APPEAL