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

CRIMINAL APPEAL NO. AAU 0052 OF 2012
(High Court HAC 128 of 2011 Ltk)

BETWEEN : **SUBRAMANI THAKUR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Mr. S. Waqainabete for the Appellant**
Mr. S. Babitu for the Respondent

Date of Hearing : **13 March 2018**

Date of Ruling : **19 March 2018**

RULING

[1] The Appellant was charged with 2 counts of Rape contrary to section 207(1) (2)(b) of the Crimes Act No.44 of 2009.

[2] The Appellant was found guilty after trial by the High Court at Lautoka, convicted and sentenced to a term of 10 years imprisonment with a non-parole term of 8 years on 22nd May 2012.

[3] The Appellant has appealed against his sentence on the following grounds:

That the learned trial Judge erred in exercising his sentencing discretion to the extent that:

a) The Appellant's remand period was subsumed as part of mitigating circumstances;
b) The non-parole period is too close to the head sentence and also in conflict with the Correction Service Act.

[4] Since the grounds of appeal are against sentence, it is an appeal in terms of Section 21(1) (c) of the Court of Appeal Act.

[5] The principles relating to an appeal against sentence has been the subject of consideration of this Court on many occasions and the standard test is as laid down by the supreme Court in **Simeli Bili Naisua v. The State**, Criminal Appeal No.CAV 0010 of 2013 which is as follows:

> *"Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant considerations."*

[6] In the present appeal the 1st contention of the Appellant is that the learned trial had subsumed his period in remand as part of the mitigating circumstances.

[7] The Appellant had spent a period a period of three months in remand before the trial.

[8] In terms of Section 24 of the Sentences and Penalties Act 2009 the period of custody should be deducted by the Court as a period of imprisonment already served.

[9] The learned trial Judge did not take into account the period of remand separately in determining the sentence. The Respondent concedes this position. However, the Respondent argues that it has not caused any prejudice to the Appellant and cited the

decision in **Singh v. State** [2016] FJCA 126; AAU009.2013 (30 September 2016) where it was stated that:

> *"I am of the view that although the learned Sentencing Judge may have fallen into error when he took the period in remand as a mitigating factor instead of taking it as a period of time already served by the offender as mentioned in section 234 of the Sentencing and Penalties Decree 2009, it has not caused any prejudice to the Appellant, as a period of 4 months has been deducted from the sentence."*

[10] In the present case the learned trial judge in his sentencing judgment, at paragraph 10 stated:

> *"Considering the mitigating circumstances*
>
> *a) You are a first offender;*
> *b) You are 70 years old;*
> *c) You submit you have 3 sons and 5 daughter, 32 grandchildren and 30 great grand children;*
> *d) (This factor can be considered as an aggravating factor also when it comes to the safety of small girls in your family)*
> *e) You claim you are an asthmatic patient;*
> *f) Your daughter seek forgiveness;*
> *g) Period in remand custody.*
> *h) Considering all your mitigating circumstances I reduce 5 years from your sentence. Now your sentence is 10 years imprisonment."*

[11] As stated in the case of **Singh v. State** (supra), no prejudice has been caused to the Appellant as a result of his remand period of 3 months not being deducted separately as 5 years have been deducted for the mitigating circumstances which included his remand period.

[12] Therefore the 1st ground of appeal of the Appellant fails.

[13] The second ground of appeal is on the basis that the non-parole period imposed on him conflicts with section 27 of the Corrections Service Act as the appellant will have to

serve 9 years and 4 months before he is released rather than after the 8 years non-parole that was set by the court.

[14] It was further submitted that considering the age of the Appellant, he being a first offender it would have been a ground to not set a non-parole period.

[15] The trial Judge in his sentencing judgment took into account the provisions of Section 18(1) of the Sentencing and Penalties Act which states:

> *"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."*

[16] The requirement that a sentencing Judge has to follow is to see that the non-parole period should not be too close to the head sentence and should be not less than six months from the head sentence.

[17] There is no requirement to consider the effect of the provisions in the Prisons and Corrections Act, 2006 especially s. 27(2) which states:

> *"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."*

[18] The application of the period of remission is a matter within the realm of the Commissioner of Prisons and is an administrative decision.

[19] However, there would appear to be a mismatch regarding the operation of the non-parole period, especially because there is no parole board, and the fixing of the period of remission. This is so because of the present practice of fixing the remission period after the completion of the non-parole period, as a result of which a prisoner would have to

serve a period of two thirds of the time between the completion of the non-parole term and the head sentence.

[20] The Supreme Court addressed this issue in **Bogidrau v. State** [2016] FJSC 5; CAV0031.2015 (21 April 2016) and stated thus:

> *"15. 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. ……"*

[21] Since the fixing of the remission period is an administrative matter, it cannot be made use of in determining whether the fixing of a non-parole period by a sentencing Judge. Therefore there is no error in the sentencing judgment.

[22] In the present case, the learned trial Judge has acted in terms of the provisions of the Sentencing and Penalties Act as stated above and therefore there is no error of law, which results in the second ground of appeal being devoid of merit.

[23] For the reasons set out above the application for leave to appeal fails and is refused.

Orders of Court:

The application for leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL