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

CRIMINAL APPEAL NO.AAU 075 of 2018
[High Court of Suva Case No. HAC 68 of 2017]

BETWEEN : **MIRZA HAROON BUKSH**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. N. Choo for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **24 April 2020**

Date of Ruling : **06 May 2020**

RULING

[1] The appellant, aged 65, had been charged in the High Court of Suva on three counts of rape of the complainant, aged 08, contrary to section 207(1) and (2) (b) and (3) of the Crimes Act No.44 of 2009 and one count of sexual assault contrary to section 210(1) (a) of the Crimes Act No.44 of 2009. The charges were as follows.

FIRST COUNT

Statement of Offence

***RAPE**: Contrary TO SECTION 207 (1)(b) AND (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***Mirza Haroon Buksh** on the 11 February 2017 at Navua in the Central Division penetrated the vagina of AS an eight year old girl with his fingers.*

SECOND COUNT

Statement of Offence

> ***RAPE**: Contrary TO SECTION 207 (1) and 2(b) AND (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

> ***Mirza Haroon Buksh** on the 11 February 2017 at Navua in the Central Division, on another occasion after that mentioned in Count 1, penetrated the vagina of AS an eight year old girl with his fingers.*

THIRD COUNT

Statement of office

> ***RAPE**: Contrary TO SECTION 207 (1) and 2(b) AND (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

> ***Mirza Haroon Buksh** on the 11 February 2017 at Navua in the Central Division, on another occasion after that mentioned in Count 1and Count 2, penetrated the vagina of AS an eight year old girl with his fingers.*

FOURTH COUNT

Statement of Offence

> ***SEXUAL ASSAULT**: Contrary to section 210(1)((a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

> ***Mirza Haroon Buksh** on the 11 February 2017 at Navua in the Central Division, unlawfully and indecently assaulted AS by squeezing her breast.*

[2] After the prosecution case was closed the appellant was tried only in respect of 1st, 2nd and 4th counts. After full trial, the majority of assessors had expressed an opinion of guilty against the appellant on all three counts on 13 July 2018. The learned High Court judge in the judgment dated 16 July 2018 had agreed with the majority of assessors and convicted the appellant of all three charges. He was sentenced on 18 July 2018 to 13 years and 10 months of imprisonment with a non-parole period of 10 years and 10 months.

[3] The appellant's counsel had filed a timely application for leave to appeal containing 14 grounds of appeal on 14 August 2018 against conviction and sentence. Written submissions on his behalf had been filed on 06 August 2019 and 07 November 2019 while the State had tendered its written submissions on 06 November 2019.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. Therefore, the matter had been taken up for hearing on leave to appeal on 07 November 2019. However, due to the demise of Suresh Chandra RCJ the ruling could not be delivered. When the matter was called in court on 24 April 2020 both counsel agreed to have a ruling delivered by me on the written submissions already filed.

[5] The evidence presented by the prosecution as summarised in the summing-up is as follows. The complainant, aged 08, had gone to the appellant's house on the day of the incident with her parents, her brother and sister around 8.00-8.30 p.m. where several other relatives of the appellant had already arrived. The complainant had started paying with other kids and all of them had started running back and forth from the appellant's house to the adjoining house. They had had dinner at the next door neighbour's house and come back to the appellant's house. After the other children had once again gone to the adjoining house, the appellant and the complainant were seen seated on the long couch next to each other while the television was on in the sitting room. At one point of time, the appellant is alleged to have put his hand underneath the complainant's tights and panty and then put his finger in her *'hole in the private part'* while looking around to see if anyone was coming. The appellant had also moved his finger in a circular motion in her *'hole'*. The complainant had felt pain. Amidst her words of resistance, having withdrawn his finger from the private part of the complainant, the appellant had then put his hand inside her top and the bra touching her breast and squeezed it which had been painful to her. The appellant had thereafter once again put his finger inside her private part but not inside the *'hole'* but touched the top of her private part from outside. According to her, *"it was painful and I was like 'ouch'"* and asked the appellant to stop. This episode had drawn to its close upon the arrival of the complainant's mother into the sitting area.

[6] The complainant had narrated what the appellant had done to her to the mother in the same night after returning home who had testified to having seen the complainant and the appellant in the sitting room alone with no one else around. Dr. Elvira Ongbit who had examined the complainant on 13 February had observed the appellant's hymen to be intact and no bruises or injuries on the vagina but seen bruises on the inner side of the complainant's *labia minora* suggesting an attempted penetration or penetration on the vaginal opening (part of external female genitalia or vulva) that could have been caused by a finger. The doctor had also noted a light bruise on the left breast of the complainant that could have been the result of the breast having been squeezed. The age of the injuries had been estimated to be two days.

[7] The appellant had completely denied the allegation, given evidence and called three witnesses on his behalf at the trial. Basically his defense had been that there were several people in the house during the time he is alleged to have committed the sexual offences upon the complainant and that there was no way that he could have done them without being seen by the others as he was not alone with the complainant at any point of time. He had further said that the complainant's mother had framed him falsely because at the sitting room of his house on day of the incident when only two of them were present, he had told her that he had seen her with someone at Pacific Harbor which made her angry. She is said to have responded by stating that he had no business to interfere in her personal matters and told him *'before I leave Fiji, see what I will do to you.'*

[8] Dr. Neil Prakash Sharma summoned on behalf of the appellant had said that the bruise on the appellant's breast could have been caused also by a fall or an infection. He had further said that the injuries seen during the vaginal examination of the complainant could have been caused by blunt force, falls, infections etc. but not due to the complainant bouncing (on a couch) while legs were folded and sitting on heels. According to him, the fact that the hymen was intact meant that it was highly unlikely that there would have been any penetration of the vagina.

[9] The gist of the evidence of the other two witnesses who were the appellant's daughter and son-in-law was that they did not see the appellant and the complainant alone in the sitting room and if anything as alleged had occurred someone would have noticed.

[10] The test for leave to appeal is ***'reasonable prospect of success'*** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87.

Grounds of appeal

1. *'That the Learned Judge erred in fact and in law when in his Summing Up he did not provide a Warning to the Assessors and analyzing the following factors:*

   i. It was the complainant's mother ***who without any complaint from the Complainant said that she*** *initiated everything and asked the Complainant whether the Appellant had done something to her on the night of 11th February 2017.*
   ii. The Complainant's mother did not provide any adequate reasons why she asked that specific question to the Complainant when the Complainant did not raise this issue at all.
   iii. Initially the Complainant had said nothing happened.
   iv. The issue of rape could have been fabricated by the Complainant's mother because of her personal grievance with the Appellant.
   v. The Complainant and her mother had sufficient time and opportunity to fabricate the story before the complaint was made to the Police.

2. *That the learned Judge erred in fact and in law in not considering the fact that the Appellant called witnesses who were present on the night and who testified that the Complainant's behavior was normal and happy when they said their goodbyes that night.*

3. *That the Learned Judge erred in fact and in law in not considering and giving due weight to the fact that the Complainant's evidence of rape and indecent assault was highly improbable in light of the evidence that there were a large number of people in the house on the night in question who were frequently moving around the house and in and out of the sitting room on the night in question.*

4. *That the Learned Judge erred in fact and in law in not considering and giving due weight to the fact that the Complainant and her mother were not credible witness in that:*

   a) The Complainant did not remember most of the things when asked but only remembered being alleged touched by the Appellant and the rest of her answers were I don't know or I can't remember.

b) Both the Complainant and her mother's original statements and the evidence in Court did not match;

c) The Complainant's mother was herself sitting in the lounge for a lengthy period of time of the night of the alleged incident and did not witness any untoward behavior on the part of the Appellant and yet questioned the Complainant when they got home.

5. *That the Learned Judge erred in fact and in law in not considering and giving due weight to the fact that the Complainant mentioned that photos were taken by the Police after the incident was reported but none of these photographs were produced in Court.*

6. *That the Learned Judge erred in fact and in law in not allowing the Appellant to adduce sketches of the floor plans of the house and videos of the house.*

7. *That the Learned Judge erred in fact and in law in not considering and giving due weight to the fact that the Complainant mentioned that photos were taken by the Police after the incident was reported but none of these photographs were produced in Court.*

8. *That the Learned Judge erred in fact and in law in failing to consider and direct the Assessors and failed to analyze the issue that Dr Neil Sharma gave a reasonable explanation about the various injuries alleged to have been suffered by the Complainant, that Dr Sharma had also explained the timing of such bruises.*

9. *That the Learned Judge erred in fact and in law in failing to consider and analyze the fact that there was a credible medical report and evidence from Dr Sharma that created doubt about the Complainant's injuries and without any proper reasoning or analysis the Learned Judge accepted the State doctor's report in total and ignored Dr Sharma's report.*

10. *That the Learned Judge erred in fact and in law in failing to uphold the Defence Counsel's argument that the Complainant and her mother had fabricated the allegations against the Appellant in view of the personal grievance that the Complainant's mother had against the Appellant.*

11. *That the Learned Judge erred in fact and law in imposing a sentence which is manifestly harsh and oppressive toward the Appellant.*

12. *That the Learned Judge erred in fact and law in not considering the following mitigating factors:*

> *a) That Appellant's wife is 71 years old, sickly (asthmatic, high blood pressure) and solely dependent on the Appellant; and*
>
> *b) The Appellant also suffers from high blood pressure;*
>
> *13. That the Learned Judge erred in fact and law in failing to give proper regard to the Sentencing and Penalties Act when sentencing the Appellant.*
>
> *14. That the Learned Judge did not give regard to the one third remission period when imposing a non-parole of 10 years and 10 months.'*

01st ground of appeal

[11] Dealing with the matters set out under the 01st ground of appeal, I find that though there was no requirement in law to give any specific warnings about prosecution witnesses by the learned trial judge, he had given ample cautionary directions how the assessors should safely approach in general the evidence placed before them in paragraph 1-16 of the summing-up.

[12] On the allegation of the complaint's mother having fabricated the charges against the appellant, I find that the trial judge had drawn the attention of the assessors to the totality of the evidence of the appellant and his witnesses in paragraphs 50 -53 of the summing-up and referred specifically to the appellant's allegation against the complainant's mother in paragraph 54. In addition, the learned trial judge had given him mind to the appellant's claim of fabrication of charges in paragraph 7 of the judgment and considered him to be an unreliable witness.

[13] Therefore, there is no reasonable prospect of success of this ground succeeding.

02nd and 03rd grounds of appeal

[14] The appellant's contention is that none of the witnesses saw what the appellant is supposed to have done and when the whole family left his home, the complainant did not appear to be in a distressed mood.

[15] As pointed out above, the trial judge had summarised the evidence of the appellant and his witnesses in paragraphs 50-53 of the summing-up where his daughter and son-in-law both had testified that the complainant's family left that night happily and they had not noticed any thing different in the complainant. However, the appellant's son-in-law, Parma Nand had admitted that he was not paying any special attention to anyone when he said *'good bye'* to them.

[16] However, the complaint's mother upon arriving home found the complainant to be quiet which prompted her to ask the daughter whether she was okay. Her answer had been a subdued *'hmm'* which made the mother probing it further. The complainant had first said *'no'* when asked whether anything happened at the appellant's place but then said *'yes'* when the mother looked into her eyes and the complainant had told her what the appellant had done to her at his place. Both the mother and father had been shocked to hear that. Therefore, there is nothing improbable in the behaviour of the complainant in this instance. There was nothing surprising even if the complainant had not been seen to be in a distressed mood outwardly when the family left the appellant's house. It is very clear that something was bothering her and no one could gauge the mood of a child better than the mother.

[17] As regards the third ground of appeal, I find that in paragraph 54 of the summing-up the learned trial judge had addressed the assessors on the appellant's contention that the account given by the complainant was improbable in much as the sexual acts complained of could not have happened as several others were present in the house at the relevant time. He had also addressed his mind to the same aspect in paragraph 9 of the judgment and discounted it stating that the evidence did not suggest that there could not have been a possibility for the appellant and the complainant to be alone in the sitting room in that night. The evidence as narrated by the trial judge justifies such a conclusion.

[18] I find that the 02nd and 03rd grounds of appeal have no reasonable prospect of success in appeal.

04th ground of appeal

[19] With regard to the credibility and reliability of witnesses, the learned trial judge had addressed the assessors in paragraph 11-14 of the summing-up which are equally applicable to the complainant and her mother as well. More specific references are found in paragraphs 36, 39-42, 55 and 56 of the summing-up. Paragraphs 5, 6, 10 and 11 of the judgment, the trial judge had given his mind to the aspect of credibility and reliability of the complainant and her mother.

[20] The 04th ground of appeal has no reasonable prospect of success in appeal.

05th to 07th grounds of appeal

[21] The submission of the appellant under these grounds is that some photographs had been taken but they were not produced at the trial. The appellant argues that had they been produced they would have assisted court to decide as to whether the alleged incident would have taken place where it was alleged to have occurred with several people moving around inside the house. The same argument is advanced by the appellant with regard to some sketches and video evidence the appellant wanted to produce but refused by the trial judge.

[22] I find no reference to such photographs and sketches in the summing-up or the judgment. The State submits that the complainant's police statement does not mention anything about any photographs taken showing the inner layout of the house. In any event, any issues regarding disclosures should have been taken up at the pre-trial stage and had such photographs been available with the police the defence could have had them disclosed and produced them at the trial. According to the State, the appellant in his evidence had not made any mention of sketches he had wanted to produce. However, without the full transcript of evidence and proceedings at the trial it cannot be ascertained whether the defence had made any application to produce such sketches and if so, at what stage it was made, how the trial judge had dealt with it and whether and why he had refused that application.

[23] I see no reasonable prospect of success in 05th and 07th grounds of appeal and I make no ruling regarding the 06th ground for want of the full case record.

08th and 09th grounds of appeal

[24] The submission on these grounds is based on Dr. Sharma' evidence led on behalf of the appellant and the appellant advances the premise that this evidence cast a reasonable doubt as to how the complainant came by the injuries.

[25] The learned trial judge in paragraphs 43-46 of the summing-up narrated the evidence of Dr. Ongbit who had examined the complainant and in paragraphs 51, the evidence of Dr. Sharma whose evidence was based on the medical report and possibly Dr. Ongbit's evidence in court. He had dealt with the evidence of Dr. Sharma and the same argument now advanced by the appellant in paragraphs 8 and 12-17 of the judgment and cited **<u>Volau v State</u>** [2017] FJCA 52; AAU0011 of 2013 (26 May 2017) in support of the alleged sexual acts having been corroborated by medical evidence. I agree with the learned trial judge that the evidence of Dr. Sharma does not contradict the evidence of Dr.Ongbit and there are no irreconcilable differences between the testimonies of the two doctors.

[26] There is no reasonable prospect of success in 08th and 09th grounds of appeal.

10th ground of appeal

[27] This ground is a repetition of ground 1(iv). The trial judge had directed the assessors on the evidence of the appellant and his witnesses in paragraphs 50-53 of the summing-up and referred specifically to the appellant's allegation of fabrication against the complainant's mother in paragraph 54. In addition the learned trial judge had dealt with the appellant's claim of fabrication of charges in paragraph 7 of the judgment and considered him to be an unreliable witness. According to paragraph 38 (j) of the summing-up, when confronted with the said allegation in cross-examination the complainant's mother had said that no conversation as alleged by the appellant

took place that night and she had left the sitting room as soon as the complainant had gone to the kitchen.

[28] This ground of appeal too does not meet the threshold for leave to appeal.

[29] Before parting with grounds of appeal against conviction, I wish to remind that in **Prasad v State** Criminal Appeal No. AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 followed in **Kacivakawalu v State** [2018] FJCA 202; AAU0053.2015 (29 November 2018), the Court of Appeal stated as follows; those observations are applicable to several grounds of appeal urged by the appellant as well.

> '*The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.*'

[30] Accordingly, leave to appeal against conviction is refused.

11th – 14th grounds of appeal

[31] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal against sentence to be considered arguable there must be a**

reasonable prospect of its success in appeal. The aforesaid guidelines are as follows.

11th ground of appeal

[32] The appellant argues that the sentence of 13 years and 10 months imposed on him is manifestly harsh and excessive. In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the sentencing tariff for child rape was set between 10-16 years of imprisonment.

> *"[66] The learned sentencing judge was correct in his approach. The Court of Appeal in its judgment at paragraph 18 said:*
>
> *'Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years. There can be no fault in the sentencing approach of the learned Judge referred to above (in para 13), save as to say we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve.'*
>
> *We indorse those remarks."*

[33] In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff was enhanced to 11 to 20 years.

[34] The learned High Court judge has cited other relevant authorities as well. Therefore, the sentence of 13 years and 10 months for two acts of rape and one act of sexual assault on a 08 year old child is well within tariff and is not at all harsh and excessive.

12th ground of appeal

[35] The appellant also argues that the trial judge had not taken his age and medical condition into account. The trial judge had done that clearly in paragraph 13 of the sentencing order dated 18 July 2018.

13th ground of appeal

[36] The appellant states that the trial judge had failed to give proper regard to the Sentencing and Penalties Act. Reading the sentencing order, I find this complaint to be without any basis. The trial Judge had referred to many provisions in the Sentencing and Penalties Act and the sentencing order taken as a whole cannot be criticised on the basis urged by the appellant.

14th ground of appeal

[37] No law requires a sentencing judge to be guided by one third remission in fixing a non-parole period. There was never such intention on the part of the legislature and it was reinforced by the Corrections Service (Amendment) Act 2019.

[38] The arguments taken up based on the calculation of remission *vis-à-vis* the non-parole period appear to have been put to rest by the Corrections Service (Amendment) Act 2019. It states

> '**2.** *Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*
>
> *"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.*
>
> *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019."*
>
> *Consequential amendment*
>
> ***3.** The Sentencing and Penalties Act 2009 is amended by—*

(a) in section 18

(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and

(ii) deleting subsection (2); and

(b) deleting section 20(3).

[39] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> *"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case."***

> *'.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[40] 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 as follows.

> *"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."*

[41] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, 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 and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in

operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

[42] The changes introduced by the Corrections Service (Amendment) Act 2019 to the non-parole regime are in accord with the decisions in **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 and **Raogo v The State** CAV 003 of 2010; 19 August 2010. However, the amendment has negated the following aspects of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22

> (i) *fixing a non-parole period is quite a drastic power and to make it reasonable, it should be exercised by a Court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. (per Lokur,J)*
>
> (ii) *The power to fix a non-parole period should be exercised by the Courts in exceptional cases and circumstances and where it is absolutely necessary to do so and when that power is exercised it must be preceded by a hearing and supported by reasons. (per Lokur,J)*

[43] Corrections Service (Amendment) Act 2019 on the other hand has affirmed the following direction by the Supreme Court in ***Timo***

> *'The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court and the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period ought to be discontinued forthwith. (per Lokur,J)*

[44] Gates, J remarked in ***Timo*** as follows

> *'judicial officers need to justify the imposition of non-parole periods close to the head sentence, or*
>
> *indeed for the decision not to impose one at all,*
>
> *for section 18(1) speaks in terms of "must fix a period..." (per Gates,J)*

[45] Corrections Service (Amendment) Act 2019 has left the first part of the above observation intact while it has clearly rendered the second part irrelevant. The last comment on section 18(1) of the Sentencing and Penalties Act 2009 has been affirmed by the amendment.

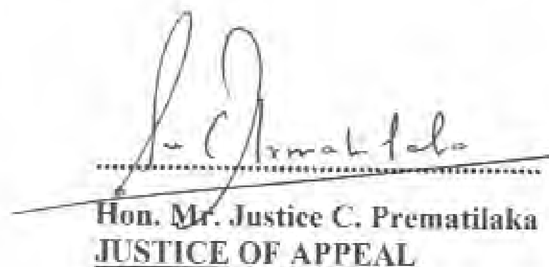
[46] Therefore, I hold that the gap of 03 years between the final sentence and the non-parole period cannot be said to violate any statutory provisions or is obnoxious to the judicial pronouncements on the need to impose a non-parole period. The 03 year gap is not too close to the head sentence and justified given the facts and circumstances of the case against the appellant.

[47] Accordingly, leave to appeal against sentence is refused as none of the above grounds has any reasonable prospect of success.

[48] Thus, leave to appeal against conviction and sentence is refused for the reasons set out above.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL