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

CRIMINAL APPEAL NO.AAU 131 of 2015
[In the High Court at Suva Case No. HAC 242 of 2014]

BETWEEN : **SENIJIELI WAQANITUVA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**
: **Bandara, JA**
: **Wimalasena, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **10 May 2021**

Date of Judgment : **27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court at Suva with one count of digital rape of a 11 year old contrary to section 207 (1) and (2)(b) and (3) of the Crimes Act, 2009 committed at Joma Village, Kadavu in the Central Division between 01 June 2010 and 31 June 2010.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors, convicted the appellant as charged and sentenced him to imprisonment of 10 years and 09 months with a non-parole period of 09 years.

[3] The appellant's appeal against conviction had been timely. Three grounds of appeal had been canvased against conviction and sentence by the Legal Aid Commission on behalf of the appellant at the leave to appeal stage with the single Judge allowing leave only on the second ground of appeal against conviction and the third ground of appeal against sentence on 04 December 2018. The three grounds of appeal placed before the single Judge read as follows:

> *'(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 erred in law 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 Legal Aid Commission is relying on written submissions filed at the leave stage for the two grounds of appeal where leave to appeal was granted while the state has filed fresh written submissions for the full court hearing. Both counsel made oral submissions as well.

Facts in brief

[5] According to the victim's evidence the incident had happened in the night when her parents had gone to her mother's village. She had been at home with her sisters and grandmother. While she was sleeping in the sitting room, the appellant whom she knew before had come home and taken a mobile phone. Her grandmother had scolded

the appellant. The appellant had come again in the same night, gone to the room and called the victim. She had refused. However, when he kept on calling her, she had gone to the room. The appellant had wanted her to remove her clothes. When he repeatedly asked her, she had removed her clothes. Then the appellant had inserted his finger into her vagina. It had been painful. When she said it was painful, the appellant had taken the finger off and left. The complainant had stated that from the light of the kerosene lantern in the sitting room, she identified the accused clearly. The victim had told the appellant that she would tell her parents.

[6] The appellant had taken up the position that the complainant had mistakenly identified him as the person who came that night and denied the allegation.

02nd ground of appeal

[7] The gist of the appellant's complaint under this ground of appeal has been succinctly articulated by the single Judge in granting leave to appeal as follows:

> *'[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 warned 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.'*

[8] The prosecution evidence consisted of the complainant (PW1), her mother (PW2), her teacher (PW3), nurse (PW4), investigating officer (PW5) and the appellant's cautioned interview as an agreed fact. The central theme of the prosecution case challenged by the appellant is his identification. According to the 11 year old victim she had known the appellant at least for 03 months prior to the incident.

[9] The appellant in his cautioned interview had admitted that he also knew the victim by her name and in fact visited Vilimoni's (*i.e.* the victim's father) house (where the victim's parent and her siblings were living) on the day of the incident *i.e.* 21 June 2010 and had tea. The appellant in his evidence had made an attempt to say that Vilimoni he referred to was from his village *i.e.* Niudua village and not from Joma village where the victim lived with her parents. But, reading the sequence of questions and answers of the appellant's cautioned statement I have no doubt that he was in fact referring to the victim's father. He had also admitted that he had an uncle by the name Saula whom he used to stay with at Joma village and he did stay with him for a week in June 2010. Thus, despite his position at the trial that he stayed at Joma village only during the first two weeks of June 2010 it is clear that he had been present at Joma village on the day of the incident in the third week and in fact visited the victim's house and had tea.

[10] At the trial giving evidence under oath the appellant had admitted knowing not only the complainant but her parents and other siblings as well. The appellant had first denied undertaking some work in Joma village in June 2010 to fix a water tank when he was there but admitted it later under cross-examination. According to the victim's mother she had known the appellant for years. She had also said that Niudua villagers used to come down to Jomo village for church services.

[11] Considering the way the appellant had acted on the day of the incident it is clear that he had been no stranger to the victim's house, for when he returned the second time in the night he had straightway gone to the room and called the victim there. The victim had identified him clearly with the light of the kerosene lantern. It is obvious from the behavior of the victim that she had been quite familiar with the appellant and the appellant had even spoken to her in the course of the encounter. Even from the fact

that the grandmother having scolded the appellant in his first visit in the night she knew that it was him and from that point of time she was awake. The victim would not have gone so readily and willingly to the room at the request of a stranger.

[12] It can reasonably be assumed that this incident had happened in the night of 21 June 2010, when the victim's parents were away from home in that night and according to the mother that was the only day where she had left home in June 2010. The appellant may have known that the victim's parents were not going to be at home in that night after he visited and had tea there during the day.

[13] The victim's teacher had visited her parents on 29 June 2010. The teacher had observed the victim's exam marks failing and her not paying attention to studies in the class as if she was lost and her not making it to the toilet on time to answer calls of nature. When confronted, the victim had revealed several acts of sexual encounters with the appellant in the past including the digital rape incident to the teacher who had then informed her parents resulting in the victim being examined by a nurse and the mother visiting the police station. Given the victim's behavioural changes, what happened on 21 June 2010 may not have been a one-off incident. However, the trial judge had correctly warned the assessors to disregard any evidence other than the digital rape incident. After they came back from the police station the victim had told the mother that the appellant had touched her private part.

[14] The appellant admitted in his evidence having stayed in Joma village in the first two weeks, first week helping his uncle and second week helping to fix the water tank which he first denied under oath. He had confessed to be in Joma village only for one week but later in the cautioned interview admitted having visited the victim's house on the day of the incident *i.e.* 21 June 2010 and had tea which incident he attributed in evidence to another house at his village. He denied in evidence visiting the victim's house on the day in question either during the day or in the night. He had denied the allegation and according to him, this was a case of mistaken identity.

[15] The trial judge had very compressively dealt with the prosecution and defence evidence at paragraphs 13- 38 of the summing-up. He had at paragraphs 42-44 clearly

administered Turnbull directions on the assessors as to the victim's identification of the appellant though it was clearly recognition of a person known to her for several months including on occasions when he used to come and play in the village. The trial judge had further directed the assessors on different aspect of the case at paragraphs 45-49 of the summing-up including *alibi* evidence of the appellant that he was at Niudua village.

[16] The trial judge in agreeing with the assessors had embarked on an extensive and independent analysis and evaluation of the evidence, both that of the prosecution and defence. He had considered the demeanour and deportment of the victim and the appellant and found the victim to be forthright as opposed to the appellant who was found not to have been truthful *inter alia* on his presence in Joma village on the day of the incident.

[17] It must always be kept in mind that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact (and law) in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016]. Therefore, in Fiji there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.

[18] This court is also mindful of the benefit the assessors and the trial judge had in seeing the witnesses giving evidence at the trial as succinctly put in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992):

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*

We are not able to usurp the functions of the lower Court and substitute our own opinion.'

[19] The counsel for the appellant has taken up the position that the trial judge had failed to address the assessors adequately on the two conflicting versions of the complainant and the appellant. **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 are relevant in connection with this kind of complaint. The Liberato direction requires that, *". . . even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt"*.

[20] The trial judge had directed the assessors on burden of proof and standard of proof at paragraphs 5 and 6 of the summing-up. His directions on how to evaluate the evidence of the victim and the appellant along with his witnesses are at paragraphs 45, 47 and 49 of the summing-up.

[21] In the first place it should be remembered that in ***Gounder*** and ***Prasad*** the conflicting versions between the prosecution and defence were limited to the narrow issue of consent. In the present case the appellant's position is one of denial and mistaken identity throwing in an *alibi* also into the mix. The trial judge had addressed the assessors and himself on all of them.

[22] I do not think that with the trial judge's directions to the assessors there would have been any risk that that the assessors may have been left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."* and therefore in my view as held in **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) a word to word *Liberato* direction was not required. The same goes with ***Gounder*** and ***Prasad*** guideline directions as well.

[23] Therefore, there are no merits in the ground of appeal against conviction.

[24] I have examined the record, either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence including that of the appellant, I am not satisfied that the assessors and the trial judge, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. Upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt and I am not satisfied that the assessors and the trial judge must as distinct from might, have entertained a reasonable doubt about the appellant's guilt (vide **Kumar v State** AAU 102 of 2015 (29 April 2021). Consequently, I hold that the verdict is reasonable and can be supported having regard to the evidence and as a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed.

02nd ground of appeal

[25] The counsel for the appellant has argued that the non-parole period is too close to the head sentence and it had offended against remission as allowed by the Prison and Corrections Act, 2006.

[26] 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."*

[27] 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'."*

[28] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal at [114] stated (see also **Chirk King Yam v State** [2015] FJCA 23; AAU0095 of 2011 (27 February 2015) and **Kumova v The Queen** [2012] VSCA 212):

> *'[114] The Court of Appeal guidelines in* ***Tora*** *and* ***Raogo*** *affirmed in* ***Bogidrau*** *by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[29] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 09 years (when the head sentence was 10 years and 09 months) fixed by the trial judge is in compliance with section 18(4). Therefore, the gap of 01 year and 09 months between the final sentence and the non-parole period cannot be said to violate any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period.

[30] Corrections Service (Amendment) Act 2019 (22 November 2019) amended section 27 of the Corrections Service Act 2006 and Sentencing and Penalties Act 2009 significantly affecting some aspects of section 18 of the Sentencing and Penalties Act 2009, as follows:

> *Section 27 amended*
>
> **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).

[31] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019 (22 November 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 (*i.e.* the non-parole period) and irrespective of the remission 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 final/head sentence not taking into account or with no consideration to the non-parole period. Therefore, when there is a non-parole period included in a sentence, the earliest date of release of the prisoner for all practical purposes would be

the date of completion of the non-parole period notwithstanding or even if he/she may be entitled to be released early upon remission of the sentence.

[32] Therefore, with the above statutory changes the time gap between the head sentence and the non-parole period does not affect the calculation of remission of one-third of the sentence.

[33] Therefore, there is no merit in this ground of appeal against sentence and the appeal against sentence should be dismissed.

Bandara, JA

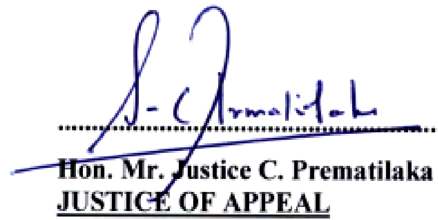
[34] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Wimalasena, JA

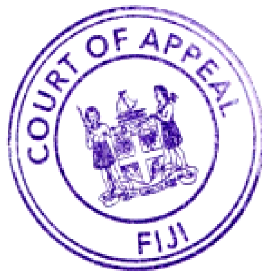
[35] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions thereof.

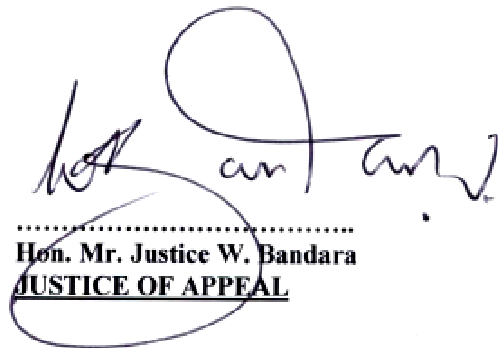
Orders

1. Appeal against conviction dismissed.
2. Appeal against sentence dismissed.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL





Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

Hon. Mr. Justice R. Wimalasena
JUSTICE OF APPEAL