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

CRIMINAL APPEAL NO. AAU 137 of 2020
[In the High Court at Lautoka Case No. HAC 160 of 2016]

BETWEEN : **RAJIV KUMAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **06 March 2023**

Date of Ruling : **08 March 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Lautoka on a single count of rape contrary to section 207(1) and (2) of the Crimes Act, 2009 committed on 07 August 2016 at Wananavu Island Resort, Rakiraki, Ra in the Western Division.

[2] After the summing-up, the assessors had expressed a majority opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him and sentenced him on 31 May 2019 to a period of 11 years and 11 months of imprisonment with a non-parole period of 09 years and 11 months.

[3] The appellant's appeal in person against conviction and sentence is timely.

[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. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[6] The learned trial judge has summarized the evidence as follows:

Judgment

'5. The prosecution alleges that the accused had taken the complainant to the house of Binesh and forced her to drink beer mixed with whisky. He had forced the complainant to come with him saying that he is the boss of her. Once the complainant got drunk and lost her conscious, he had taken her into his quarters and had sexual intercourse with her by inserting his penis into her vagina. According to the agreed facts and the evidence presented by the defence, the accused admitted that he and the complainant consumed alcohol at the house of Binesh and then came to his quarters. The accused then had sexual intercourse with her. The accused claims that the complainant consented to the sexual intercourse as she also actively participated in it.'

Sentencing order

'6. It was proved during the course of the hearing that the complainant had joined the resort as a trainee chef a week prior to this incident. After this incident, she had to leave the employment and go back to her home in Suva......

7. You have forced the complainant to drink beer mixed with whisky. It was you that invited her to go to the drinking place. When the complainant was reluctant to go without informing her cousin, which whom she stayed while attending to her employment at the Resort, you have lured her into the drinking place, saying that you have informed the wife of her cousin. Once she got drunk and lost her consciousness, you have taken her into your official quarters instead of dropping her at her cousin's place. The evidence of Setareki confirms that you have pulled and dragged her into your room when she fell down and looked lifeless at the quarters. In view of these facts, it is clear that this is premeditated act, which you have planned and carried out in order to satisfy your sexual gratification without having any remorse to this new young employee who recently started her career under your supervision………'

[7] The grounds of appeal against conviction and sentence urged on behalf of the appellant are as follows:

Conviction

Ground A

THAT the Learned Trial Judge erred in law and in fact in not directing the assessors on the issue relating to the standard of proof, burden of proof vis-à-vis the weight to be attached to the overall factual matrix of the evidence against the appellant items of consent sexual intercourse.

Ground B

THAT the Learned Trial Judge erred in law and in fact failed to give cogent reasons from differing with the majority opinion of the assessors according to section 237 (5) of the Criminal Procedure Act.

Ground C

THAT the Learned Trial Judge erred in law and in fact failed to direct the assessors on the principles of recent complaint by the complainant regards to the sexual intercourse.

Ground D

THAT the Learned Trial Judge erred in law thus failed to consider that the prosecution has failed to prove following ingredients of the elements of the offence beyond reasonable doubt evidence of the complainant.

Ground E and F are combined

THAT the Learned Trial Judge erred in law in allowing prosecution to proceed the trial without a medical report been tendered in court as evidence in fact thus failed to comply with section 133 of the Criminal Procedure Decree thus which permits the report to be produced, provided that two condition are satisfied, the report has been served on the defence not less than 21 clear days before the trial.

Ground G

THAT the Learned Trial Judge erred in law thus failed to direct the assessors or give a proper warning regards to the inconsistency and conflicting evidence given by complainant thus no independent assessment of evidence before affirming a verdict which is unsafe, unsatisfactory and unsupported by the evidence has given rise to grave miscarriage of justice.

Ground H

THAT the Learned Trial Judge did not properly access the evidence and thus failed to consider the defence items of evidence favourable to the accused and as a result substantial and grave injustice was caused to the accused.

Ground I

THAT the Learned Trial Judge in his summing up failed to give adequate directions regarding the fundamental matter or matters such as credibility of witness, evaluation of circumstantial and not present of expert evidence thus miscarriage of justice, petitioner was deprived from fair trial.

Sentence

Ground J

THAT the Sentencing Judge erred in law in imposing the non-parole period to close to the head sentence without proper cogent reasons being given.

Ground A

[8] Contrary to the appellant's submissions, the trial judge had dealt with the standard and burden of proof at paragraphs 7-9 of the summing-up and he had dealt with the issue of consent at paragraphs 14-17 and 34-36 of the summing-up. The trial judge was correct in not directing the assessors what weight they should attach to the factual matrix in relation to the issue of consent. He had left it to the assessors to decide.

Ground B

[9] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) the Court of Appeal highlighted the trial judge's scope of duty when he agrees with the assessors as follows:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]'*

[10] However, the trial judge had done more that he was required to do in agreeing with the majority of assessors in the judgment, particularly had had paid full attention to the question of consent which was central issue at the trial.

Ground C

[11] The trial judge's comprehensive directions on delay in the first complaint is found at paragraphs 37-40 of the summing-up. Though, the trial judge had not cited to the assessors, applying the 'totality of circumstances' test regarding how to assess a complaint of delay suggested in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), I am convinced that there cannot be a reasonable prospect of success based on this ground.

[12] However, if the complainant's mother's evidence is considered as recent complaint evidence, the trial judge has failed to caution the assessors that recent complaint evidence is not evidence of the facts complained of and cannot be regarded as

corroboration of the complainant's evidence but goes only to the consistency of the conduct of the complainant with her evidence given at the trial (**Raj v State** [2014] FJSC 12; CAV0003 of 2014 (20 August 2014) (supra) and **Senikarawa v State** ([2006] FJCA 25; AAU 0005 of 2004S (24 March 2006)]. In other words, recent complaint evidence would only support and enhance the credibility of the complainant *via* her consistency. In that context it was held in ***Senikarawa*** that it would be a misdirection to say that recent complaint evidence would strengthen the complainant's evidence but to state that it would strengthen the complainant's credibility will not be regarded as a misdirection.

[13] The appellant's counsel had not sought redirections in respect of the above omission and the failure to do so would disentitle the appellant even to raise them in appeal with any credibility as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[14] Even otherwise, excluding the mother's evidence, the evidence of the complainant and Setareki Raiyawa was enough to prove the case beyond reasonable doubt.

Ground D

[15] The basis of this ground of appeal appears to be that the verdict is unreasonable. However, it is clear from the totality of the evidence that it was open to the assessors and the trial judge to have arrived at the guilty verdict.

[16] The Court of Appeal set down in **Kumar v State** AAU 102 of 2015 (29 April 2021) the test on *'unreasonable or cannot be supported having regard to the evidence'* in section 23(1)(a) as follows [also see **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)]:

> *'[23] ……………To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt"*

> *is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.'*

[17] When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. I think that the trial judge could have reasonably convicted the appellant of rape as he had evaluated and independently assessed the evidence on the question of consent.

Ground E and F

[18] In terms of section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence (by medical evidence or otherwise) is necessary for that person to be convicted and in any such case the judge or magistrate is not be required to give any warning to the assessors relating to the absence of corroboration. The prosecution need not have called medical evidence to prove the charge as the appellant did not contest the act of sexual intercourse. The evidence of absence of consent was led through the complainant. Had he thought it crucial for the defence case, he could have summoned the doctor who may have examined the complainant.

Ground G

[19] The inconsistencies or contradictions the appellant has pointed out are not related to the complainant's evidence on the main issue of consent but on peripheral matters. They are not so fundamental as to cause her testimony unreliable and untruthful.

[20] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), the Court of Appeal said:

> '[15] *It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions,*

contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.'

[21] The appellant's counsel had not sought redirections in respect of the alleged inconsistencies or contradictions, obviously due to the fact that do not go to the root of the complainant's evidence and affect the very foundation of her evidence.

Ground H

[22] On a perusal of the summing-up, it appears that it was a very fair, balanced and objective summing-up. It has dealt with the prosecution and the defence cases maintaining the required equilibrium.

[23] In discussing the defence evidence the trial judge had dealt with Brown v Dunn Rule [**Browne v Dunn** (1893) 6 R 67 at 70-71] as well in the context of Setareki's evidence that the complainant fell down on the floor when she entered the flat/house and she was drunk and lifeless and the appellant pulled and dragged her into his room. The appellant's evidence was that the complainant did not fall down, but she tripped backwards while climbing the steps but she managed to hold on to him but that position had not been put to Setareki. It appears that this is not a matter the prosecuting counsel had raised but the trial judge on his own had picked it up for comments to the assessors.

[24] The trial judge had said that the failure to put such questions could be used to draw an inference that the appellant did not give that account of events to his counsel but warned the assessors that before they drew such an inference they should consider other possible explanations for the failure of the counsel to put questions about the different versions. The trial judge had then proceeded to explain some possible reasons for the trial counsel's failure and again cautioned the assessors that they should consider whether there are other reasonable explanations for the failure to ask Setareki about the different versions and warned that they should not draw any

adverse inference against the appellant's credibility unless there is no other reasonable explanation for such failure.

[25] In **Hoffer v R** [2021] HCA 36; 95 ALJR 937; 395 ALR 1; 291 A Crim R, the only issue was whether it had been established beyond reasonable doubt that the appellant knew that each of the complainants was not consenting or was reckless as to whether she was consenting. During the course of the appellant's cross-examination at trial, it became apparent that certain of his evidence which was inconsistent with or contradicted that of the complainants had not been put to them by defence counsel for comment. Towards the end of these areas of cross-examination the prosecutor put to the appellant that two aspects of his evidence which had not been put to the complainants were, in effect, of recent invention. Defence counsel did not pursue objections to these suggestions of recent invention and the trial judge did not give the jury directions as to the use which could be made of this evidence.

[26] The general rule of practice ('Brown v Dunn Rule') requires that where it is intended that the evidence of the witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony should be put to the witness by the cross-examiner for his or her comment or explanation. Thus, as a general rule, defence counsel should put to witnesses for the State/Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence. In **MWJ v The Queen** (2005) 80 ALJR 329 at 333 [18]; 222 ALR 436 at 440-441, it was noted that in many jurisdictions this rule has been held to apply in the administration of criminal justice.

[27] As said in **R v Birks** (1990) 19 NSWLR 677 at 688 in criminal proceedings, it is not uncommon for matters which have not been put to the appropriate Crown witness to emerge from the evidence of an accused person, including during the course of cross-examination. It was said in ***MWJ*** that an obvious course which may be taken is to recall the witness so that the omission can be corrected. This may be preferable and may be undertaken without injustice, depending on the course the trial has taken. However, course sometimes taken by the prosecution is to cross-examine the accused

as to the omission. The cross-examination undertaken is not limited to drawing the attention of the accused to the fact of the omission, so as to highlight the matter for the jury. It extends to the reason for the omission. The evident purpose of the cross-examination is to impugn the credit of the accused by suggesting that the matter is of recent invention. Gleeson CJ observed in **R v Birks** (supra) at p 690, that it is one thing for the cross-examiner to point to the unfairness to a witness who has not had the opportunity to comment, it is quite another to suggest that the result of a failure to observe the rule of practice is that a person should not be believed.

[28] King CJ observed in **R v Manunta** (1989) 54 SASR 17 at 23 that an examination of an accused person which proceeds by reference to there being but one reason why a matter has not been put to a witness is "fraught with peril" because there may be many explanations for the omission which do not reflect upon the credibility of the accused. The examples are defence counsel misunderstanding the accused's instructions or where forensic pressures may have resulted in looseness in the framing of questions or the possibility that defence counsel has chosen not to advance certain matters upon which he or she had instructions because they were unlikely to assist the defence.

[29] Accordingly it was held in **Hoffer v R** (supra) *inter alia* that:

> *'[34] Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the credit of an accused. Except in the clearest of cases, where there are clear indications of recent invention, an accused person should not be subjected to this kind of questioning. The potential for prejudice to an accused is obvious.*
>
> *[37] A trial judge should be alert to the problems associated with cross-examination. They should be raised with counsel at an early point. Where the cross-examination has occurred, it will be necessary for the trial judge to warn the jury about any assumption made by the cross-examiner, to draw attention to the possible reasons why the matter has not been put and to direct the jury as to whether any inferences are available.'*

[30] The High Court also held in **Hoffer v R** (supra):

> '*[42] The questioning undertaken by the prosecution of the appellant departed from the standards of a trial to which an accused is entitled and the standards of fairness which must attend it[24]. The questioning was such as to imply that the appellant was obliged to provide an explanation as to why matters had not been put to C1 or C2. This suggested he possessed information which he had not given counsel by way of instructions. The unfairness in this regard was compounded when the appellant was not permitted by the trial judge to provide an answer and by defence counsel not informing the court that he had those instructions. The attack upon the appellant's credit by assertions of recent invention was based upon an assumption which was not warranted. All of these matters were highly prejudicial to the appellant.*
>
> *[47] The prejudice to the appellant was not addressed by the trial judge, as it should have been. It was necessary that the trial judge put the omissions in perspective, discount any assumption as to why they occurred by reference to other possibilities and warn the jury about drawing any inference on the basis of a mere assumption. Absent such directions there was a real chance that the jury may have assumed that the reason for the omission was that the appellant had changed or more recently made up his story.'*

[31] Having held that there has been a miscarriage of justice and therefore s 6(1) of the Criminal Appeal Act requires that the appeal be allowed, unless it be determined that the proviso applies, the High Court nevertheless decided that it is not a case where there has been a failure of process that involves a serious breach of the presuppositions of the trial, such that the proviso cannot be applied and the appellant's conviction did not involve a substantial miscarriage of justice within the meaning of the proviso.

[32] In ***Birks*** (at 681-3, 692), the accused was cross-examined as to the instructions he had given when his counsel had failed to put certain matters to the complainant. The accused answered that he had given those instructions, a fact confirmed by his counsel after the jury retired. The conduct of the prosecutor, and later the trial judge, in pursuing the omission as a matter of credibility of the accused's evidence, was held to have resulted in a miscarriage of justice.

[33] In **Picker v The Queen** [2002] NSWCCA 78 at [40] & [41], the defence was that the complainant initiated sexual intercourse, but defence counsel had left out some of the accused's instructions. The prosecutor pointed out the omissions to the accused and put to him that he had made them up. The cross-examination was held to be impermissible and highly prejudicial to the accused's case.

[34] In **Weiss v The Queen** (2005) 224 CLR 300 at 314 [35], 317 [44], the High Court of Australia resolved the apparent tension in the former Victorian equivalent of s 6(1) of the Criminal Appeal Act between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, and the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, on the basis that the appellate court's assessment of the appellant's guilt "is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do", but on the basis that the appellate court is itself satisfied of the appellant's guilt beyond reasonable doubt. Henceforth, the function of the appellate court was to be understood to require the court to make its own independent assessment of whether the appellant was proved guilty of the offence on which the jury had returned the verdict of guilt [at 315-316 [39]-[41]. Unless itself persuaded that the evidence properly admitted at trial established guilt beyond reasonable doubt, the appellate court was to be precluded from concluding that no substantial miscarriage of justice had actually occurred [at 317 [44]. The pivot that occurred in the introduction of that negative proposition was from an "effect-on-the-jury" conception of the appellate function to a "determination-of-guilt" conception of the appellate function. (*emphasis added*)

[35] As was explained by the plurality in **Kalbasi v Western Australia** (2018) 264 CLR 62 at 70 [12], in such a case "the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had". (*emphasis added*)

[36] In the current case the prosecution had not even cross-examined the appellant as to the omission to put his position to Setareki but it was highlighted by the trial judge who, however, cautioned the assessors that they should consider whether there are other reasonable explanations for the failure to ask the above stated witness of the prosecution about such different versions and warned that they should not draw any adverse inference against the accused's credibility unless there is no other reasonable explanation for such failure. Thus, when the trial judge had directed himself according to the summing-up in the judgment including the aforesaid caution and warning, his statement there that the version of the event explained by the appellant was never put to Setareki when he gave evidence, in my view, could not have contributed materially to the trial judge's decision to find the appellant guilty. Moreover, the omission in the appellant's case was on a somewhat peripheral matter and not directly on the issue of consent unlike in **Hoffer v R** (supra). ***Weiss*** at 317 [44] requires the appellate court to consider the nature and effect of the error in every case.

[37] Therefore, I do not think that there is a reasonable prospect of success in the appeal against conviction arising from the trial judge's directions on Brown v Dunn Rule on the basis of miscarriage of justice. Hypothetically, even if it had resulted in a miscarriage of justice under section 23(1)(a) of the Court of Appeal Act, the proviso would readily be applied as there cannot be any substantial miscarriage of justice. As pointed out earlier, the appellate court could be satisfied of the appellant's guilt beyond reasonable doubt on the totality of the evidence. While the State did not rely on the omission to put the appellant's position to Setareki there were other, and overwhelmingly sufficient, reasons for rejecting the appellant's evidence that the complainant was consenting, and to conclude on the whole of the evidence that he had intended to rape her or entertained the knowledge of lack of consent or was at least reckless as to her consent, and so to find him guilty beyond reasonable doubt. The appellant's evidence that the complainant was consenting to having sex with him was so glaringly improbable that it was not capable of raising a doubt in the mind of reasonable assessors or the judge as to whether the complainant consented to having sex with him.

Ground I

[38] As already stated, the trial judge had delivered a very fair summing-up covering all the evidence, both for the prosecution and defence. He has no basis to complain of having been deprived of a fair trial.

Ground J (sentence)

[39] The tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. Thus, the sentence is within but at the higher end of the tariff.

[40] In **Singh v State** [2016] FJCA 126; AAU009.2013 (30 September 2016) the Court of Appeal remarked:

> *'I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.'*

[41] 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'.*

[42] 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:

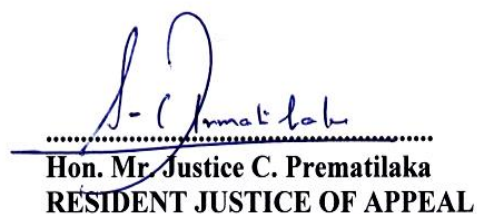
> *"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[43] It was held in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20 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.

[44] In the light of the above principles, I see no error in fixing the non-parole period at 09 years and 11 months, 02 years less than the head sentence of 11 years and 11 months. .

Orders of the Court:

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



....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL