**IN THE SUPREME COURT OF FIJI**
**[CRIMINAL APPELLATE JURISDICTION]**

**CRIMINAL PETITION No: CAV 0040.2016**
**(On Appeal from Court of Appeal No: AAU 008.2013)**

**BETWEEN** : **PENI TUROGO**

***Petitioner***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
**Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court**
**Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court**

**Counsel** : **Petitioner in Person**
**Mr. M. Korovou for the Respondent**

**Date of Hearing:** **05 July 2017**

**Date of Judgment:** **20 July 2017**

# JUDGMENT

**Gates, P**

[1] I have read in draft the judgment of Ekanayake J. I am in full agreement with its conclusions and reasoning, and with the orders proposed.

**Chandra, J**

[2] I agree with Justice Ekanayake's conclusions, reasoning and the orders proposed.

**Ekanayake, J**

Introduction

[3] The petitioner namely, Peni Turogo by his petition dated 30/9/2016 (received by the registry of the Supreme Court on 26/10/2016) has sought special leave to appeal from this Court against the Judgment of the Court of Appeal pronounced on 30/9/2016.

[4] The following grounds of appeal have been submitted in the above petition:

**Grounds of Appeal**

**Conviction**

1. Having regard to paragraph 5 of the judgment of the Court of Appeal, the Court erred in principle and in law in not considering and determining the appellant's further grounds of appeal dated 30th October 2015 and 6th June 2016, on 26th July 2016 causing gross miscarriage of justice.

2. Having regard to the call over on 15th June, 2016, the Court erred in principle and in law in not giving proper advise to the counsel of the appellant about the further grounds of the appellant dated 30th October 2015 and 6th June 2016 so that the counsel for the appellant can prepare the submission before the hearing date on 26th July 2016 and as such miscarriage of justice has occurred.

3. Having regard to paragraph 8 of the judgment of the Court of Appeal the Court erred in principle and in law in not considering the error of the trial judge in not directing the assessors on the alleged impersonator because there was no formal complaint by the complainant, Wati or Tomu at the Dreketi Police Station against the appellant that resulted in a gross miscarriage of justice.

4. Having regard to paragraphs 38 and 39 of the judgment of the Court of Appeal, the Court erred in principle and in law in not taking into account the error of the trial judge for being silent about the inconsistencies of the two doctors uncorroborated findings and let it to the assessors to decide which doctor to rely on, which is

prejudicial to a fair trial, an exceptional circumstances and or a grave injustice has occurred.

5. Misguided representation by counsel for the appellant at the hearing of the Court of Appeal. Sought to have the rejected grounds to be determined by the Court in terms of section 35(3) of the Court of Appeal Act without the approval/consent of the appellant.

6. Having regard to paragraphs 11, 12, 13 of the Judgment of the Court of Appeal the Court erred in principle and in law to place an impersonator informant on the same category of an anonymous informant.

7. Police at Dreketi abused their powers and breached established procedures.

8. The learned trial judge erred in law in allowing amendment of charge out of the Court room.

9. DPP Northern officer abused their powers and official duties in handling the case.

10. That the amendment of the charge outside of the Court room without leave to of Court contravenes section 214(1)(9)(10); section 215 and section 182 (1)(a)(b), 2(a)(b) and section 183(a)(b)(c)(d)(e) and as such resulted in miscarriage of justice.

11. Misguided Legal Representation by counsel for defendant at the trial Court in Labasa.

**Sentence**

1. Having regard to paragraph 63 of the judgment of the Court of Appeal, the Court erred in law.

2. That the trial judge erred in law in not declining to fix the non parole term too close to the head sentence that failed to give effect to the rehabilitation of the appellant and denied and deprived the opportunity to rehabilitate him.

3. That the trial judge erred in law in setting the non parole period.

4. That the trial judge erred in principle and in law in setting the non parole term more than 75% of the head sentence with no reason given.

5. That the appellant reserves the right to add, alter and or amend the grounds of appeal.

6. And upon such other grounds that the appellant may be advised upon receipt of the Court record.

[5] The Petitioner was initially charged with 3 counts of rape and one count of indecent assault in the High Court at Labasa. Before the commencement of the trial, on 29/1/2013 the State with leave of the trial judge amended the information by substituting the 1 – 3 rape charges with 3 counts of incest by male and the 4th count of indecent assault remained.

[6] Then the petitioner was tried in the High Court at Labasa on the following charges:-

*"PENI TUROGO is charged with the following offences:*

***FIRST COUNT***

***(Representative Count)***

***Statement of Offence***

***INCEST BY MALE****: Contrary to 178(1) of the Penal Code Cap.17.*

*PENI TUROGO between the 1st day of January 2009 to the 31st day of January 2010 at Dreketi, Macuata in the Northern Division, had carnal knowledge of K.T. who was to his knowledge his daughter.*

***SECOND COUNT***

***(Representative Count)***

***Statement of Offence***

***INCEST****: Contrary to Section 223 of the Crimes Decree No. 44 of 2009.*

***Particulars of Offence***

*PENI TUROGO between the 1st day of February 2010 and the 31st day of December 2011at Dreketi, Macuata in the Northern Division, had unlawful carnal knowledge of his daughter namely K.T.*

***THIRD COUNT***

***Statement of Offence***

***INCEST***: *Contrary to Section 223 of the Crimes Decree No. 44 of 2009.*

***Particulars of Offence***

***PENI TUROGO*** *on the 14th day of April 2012 at Dreketi, Macuata in the Northern Division, had unlawful carnal knowledge of his daughter namely* ***K.T.***

***FOURTH COUNT***

***Statement of Offence***

***INDECENT ASSAULT***: *Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.*

***Particulars of Offence***

***PENI TUROGO*** *on the 21st day of May 2012 at Dreketi, Macuata in the Northern Division, unlawfully and indecently assaulted a girl namely K.T. by kissing her on the mouth".*

[7] The petitioner having pleaded not guilty to the charges, after conclusion of the trial the assessors had returned a unanimous verdict of guilty for 1 – 3 counts and not guilty for the 4th count. Having agreed with the assessors the learned High Court Judge had convicted the petitioner on 1 – 3 counts and acquitted him from the 4th count.

[8] By the sentencing order of 1/2/2013 the petitioner was sentenced as follows:
For 1-3 counts - 11 years imprisonment for each count, but the sentences to run concurrently, with a non-parole period of 9 years.

[9] Being aggrieved by the above, the petitioner had lodged an application for leave to appeal to the Court of Appeal against conviction and sentence on 8 grounds which had been later expanded from time to time. By the ruling dated 6/3/2015, a single Judge of the Court of Appeal had rejected all the grounds against conviction and sentence. Thereafter the

petitioner had sought to have the grounds rejected by the single Judge, determined by a Full Court in terms of Sections 35(3) of the Court of Appeal Act.

[10] The learned Justices of the Court of Appeal by their judgment dated 30/9/2016 had dismissed the appeal and affirmed the conviction and sentence.

[11] The petitioner being aggrieved by the above judgment of the Court of Appeal has assailed the same in this Court.

[12] Petitioner's petition to this Court has been filed on 26/10/2016 (as per the date stamp appearing on the minute). The impugned judgment of the Court of Appeal had been pronounced on 30th September 2016. The petition had been lodged within the prescribed time frame of 42 days stipulated in Rule 5 of the Supreme Court Rules 2016. Thus it is a timely application.

**Special Leave to Appeal**

[13] Section 7 of the Supreme Court Act No. 14 of 1998 deals with special leave to appeal to the Supreme Court. Section 7 thus reads as follows:-

> 7 (1). In exercising its jurisdiction under Section 98 [formerly section 122] of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstance of the case-
>
> (a) refuse to grant special leave to appeal;
>
> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
>
> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.

Section 7(2):-

In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

(a) a question of general legal importance is involved;

(b) a substantial question of principle affecting the administration of criminal justice is involved; or

(c) substantial and grave injustice may otherwise occur.

[14] In this jurisdiction it is well settled that the criteria set out in Section 7(2) of the Supreme Court Act are extremely stringent and special leave to appeal is not granted as a matter of course. In **Dip Chand v State**; CAV 004.2010(9/5/12) had clearly held as follows:-

> *"....Given that the criteria is set out in Section 7 (2) of the* Supreme Court Act *No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course the fact that the majority of the grounds relied upon by the Petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the Petitioner of crossing satisfying (sic) the threshold requirements for special leave even more difficult."*

**In the Court of Appeal**

[15] Several grounds of appeal had been raised in the Court of Appeal against conviction.

[16] Although several grounds of appeal were submitted to the Court of Appeal, in terms of paragraph 6 of the Court of Appeal judgment it is manifest that at the hearing the counsel for the appellant had confined himself only to the grounds set out in his written submissions filed in that court. Further having withdrawn grounds 1,5,10 and11 and counsel submitting that he was not pursuing ground 2 as well, the Court of appeal had

only dealt with grounds 3,4,6,7,8,9 submitted on the conviction and the sole ground submitted on sentence.

[17] The grounds on conviction and the sentence which were considered by the Court of Appeal are produced in paragraph 7 of the Court of Appeal judgment.

**Grounds of Appeal Against Conviction Submitted to this Court**

[18] The issues involved in grounds 1 and 2 of the grounds of appeal submitted to this Court appear to be on paragraphs 5 and 6 of the Court of Appeal judgment where finding was made in respect of grounds of appeal tendered to that Court dated 31/10/2015, 6/6/2016, 26.7.2016. The learned Judges of the Court of Appeal in paragraph 6 have given reasons as to why they proceeded to consider only Grounds 3, 4 and 6 to 9 raised against the conviction and the sole ground raised against sentence. Those reasons were that:

1) *Petitioner's counsel confined himself only to grounds set out in his written submissions,*
2) *By those submissions grounds 1,5,10 and 11 were withdrawn or abandoned,*
3) *Petitioner's counsel had informed that he was not pursuing the 2nd ground as well,*

[19] The 2nd ground raised here is based on the failure of the Court of Appeal to give proper advice to the petitioner's counsel on the call over on 15/6/2016, in respect of further grounds dated 30/10/2015. It is well settled that Judges are not required to advise the counsel with regard to what they should do on filing of submissions. The above ground has been rejected on that basis. In view of the above I am satisfied that Judges cannot be faulted for having dismissed both above grounds.

[20] Ground 3 raised here is against paragraph 8 of the Court of Appeal judgment wherein it is alleged that the court erred in principle and in law in not directing the assessors on the alleged impersonator, on the basis that there was no formal complaint made by the

complainant, Wati (the mother of the victim) or Tomu at the Dreketi Police Station against the petitioner resulting in a gross miscarriage of justice.

[21] The above complaint had been carefully dealt with in paragraphs 8 – 13 of the impugned judgment of the Court of Appeal. The thrust of the submission in this regard was that, there was no formal complaint by the complainant, her mother, Wati or her uncle, Waisale Tomu, against the petitioner but the complaint had been made by an alleged impersonator.

[22] Ground 6 raised here (as produced in preceding paragraph 4) is also in relation to the Court of Appeal having erred in principle and in law in placing an impersonator informant in the same category as an anonymous informant. Thus I wish to consider Grounds 3 and 6 together.

[23] It is evident that the petitioner was the biological father of the victim (K.T.), and sexual offences had been committed on her over a long period of time spanning over more than 3 years. Her mother (Wati - petitioner's legal wife) was the person who had got the initial suspicion of this. Further the uncontradicted testimony of the victim was that she did not divulge it to anybody because of the threats induced by the petitioner not to divulge to anybody.

[24] The Court of Appeal in paragraphs 12 & 13 of the impugned judgment has dealt with the above. The said paragraphs are reproduced below:-

> *"[12] But, does it really matter or is it fatal to the convictions that we do not know exactly who had actually given the first information to the police of the incestuous relationship between the Appellant and the victim? My emphatic answer would be in the negative. There is no provision of law regulating or limiting the status of informants who can provide information of suspected crimes. Information given even by an anonymous informant could be the basis of a criminal investigation and is sufficient to set the investigative process in motion. Impersonator is no different.*

*[13] I think the Learned High Court Judge has adequately addressed the assessors on the receipt of the information in paragraph 4 of the summing up and I do not agree that there should have been directions to the assessors on the so called impersonator. I am of the view that the absence of such a direction had not resulted in any miscarriage of justice to the Appellant. This ground of appeal is accordingly rejected"..*

[25] I am satisfied that the conclusions of the Court of Appeal based on the reasons given in the above two paragraphs with regard to the above are correct. Thus I reject the grounds 3 and 6 submitted to this Court.

[26] Complaint raised by Ground 4 was that the trial judge allowing the assessors to decide which doctor's evidence was to be relied upon, when the findings of the doctors were inconsistent. The above ground 4 is same as ground 9 raised in the Court of Appeal. For the reasons given in paragraphs 38-40 of the impugned judgment, the Court of Appeal had rejected the above ground.

[27] Two doctors had examined the victim during investigations. First by Dr. Prakash on 28/5/12. He was a doctor who had seen only 3 patients relating to sexual offences and who was not a gynaecologist. In his Medical Report under item D12, it is reported that the victim's hymen was intact. The 2nd examination was held on 30/5/12 by Dr. Brian - a Gynaecologist.

[28] WPC Tuliana had testified that Dr.Prakash had advised her to go to Labasa for a 2nd opinion. That is how the victim happened to be examined by Dr. Brian on 30/5/2012, who was a Gynaecologist. He found that the victim's hymen was not intact and she may have had sex. As per his uncontradicted testimony, he had passed in 2008, been in charge of Obstetrics and Gynaecology in Labasa Hospital from 2011 and by the time of testifying he had examined approximately 26 cases related to this area.

[29] Dr. Brian was the prosecution witness No. 2. In the medical report prepared by him which was marked in the prosecution case, in item A (4) therein - 'under background information' - it is recorded that – 'the victim allege that her father is having sexual intercourse with her since year 2009. Further in Item 10 under – "History as related by the person to be examined" it says that:-

> *"According to patient, she had been forced to have sex with her father since class 8, on numerous occasions. Sex involved his penis being inserted into her vagina. She did not reveal this earlier as she said she was frightened. She denies any intercourse with any other persons."*

[30] Now I find that the trial Judge had in his summing up at paragraph 23has stated as follows:

> *"Two doctors have given evidence and tendered their Medical Reports of the victim to this court. To both doctors victim had given the same history. The doctor who examined the victim first had only checked 03 patients relating to sexual offences. But the doctor who checked the victim subsequently had seen 26 sexual related cases prior to this case. The doctor who gave evidence on behalf of the accused admitted that doctor who gave evidence on behalf of the prosecution more experienced than him. You have to consider this documentary evidence very carefully".*

Always a summing up has to be objective and balanced as it was observed in **R v Fotu** [1995] 3NZLR 129.

[31] When the above directions are considered I am unable to conclude that the judge has committed any error. All he has done is, having explained the evidence, and invited the assessors to carefully consider the medical reports which being evidence of fact. The assessors are the judges on evidence of fact.

[32] On a careful consideration of the reasons given by the Court of Appeal in rejecting the above ground when raised in that Court, I see no reason to disagree with the same.

[33] However, I wish to quote section 129 of the Criminal Procedure Decree 2009 which stipulates that the Judge shall not be required to give any warning to the assessors relating to absence of corroboration.

> *"Section 129 of the above Decree states: 'Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."*

[34] For the above reasons, I reject the said ground 4 also.

[35] Now I shall advert to grounds 5 and 11 (as listed in preceding paragraph 4). Since both deal with the alleged misguided representations by the petitioner's counsel in Court of Appeal and in the trial court, I proceed to consider those two together.

[36] However, this had not been raised before the Court of Appeal. A perusal of High Court record reveals that throughout, the petitioner had been represented by counsel and also he had cross- examined some prosecution witnesses at length. But there is nothing on record which suggests that the petitioner had taken any action against the counsel for misguided representation.

[37] Now I proceed to consider Grounds 8 and 10 submitted to this Court (embodied in paragraph 4 above). Since both grounds are in relation to the amendment to the charge, those will be dealt together.

[38] It is alleged that the learned trial Judge erred in law in allowing the amendment out of court and it was done without leave of court in contravening certain sections but it is silent about the statute.

[39] It is noted that these two grounds were not raised in the Court of Appeal. Perusal of the High Court record shows that the amendment had been allowed during the court proceedings on 29/1/13 and also in the presence of the petitioner and the counsel who represented him in court. The counsel had not objected to the application of the State to file amended information. In view of the above the Court had proceeded to allow the amendment. It is amply demonstrated by the below mentioned portion of the proceedings before the High Court on 29/1/13:

> *"State Counsel present. Accused present...Lemaki for the Accused.*
> *State Counsel made application and sought this court's permission to file amended information application allowed. State counsel filed amended information".*

Thus it appears that this amendment was done in compliance with Section 214 of the Criminal Procedure Code. As such there is no merit in those grounds and same are hereby rejected.

[40] Grounds 7 and 9 are as follows:-

> *"7. Police at Dreketi abused their powers and breached established procedures.*
>
> *9. DPP Northern office abused their powers and duties in handling the case".*

The above two grounds had been raised and argued before the Court of Appeal as per paragraph 19 of the Court of Appeal judgment. The complaint had been that the victim was given the statement made by her to the police to refresh her memory during the course of the trial. This ground has been dealt extensively in paragraphs 18 – 31 of the Court of Appeal judgment. At the outset it is observed that basis of the complaint is not specified. However, a contradictory stance has been taken up by the victim in her testimony at page 239, which is to the following effect:-

> *Q. Did anyone give your statement given to police yesterday?*
> *A. I was given.*
> *Q. Did anyone give your statement given to police that morning?*
> *A. No.*

On a perusal of the victim's evidence it becomes amply clear that having shown the police statement to her, she was subjected to vigorous cross-examination by the Petitioner's counsel. With regard to witness refreshing memory, it would be useful to cite the decision in **Lau Pak Ngam v The Queen**, SC HK [1966] CLR 443.

> *"... Held, dismissing the appeal, whilst anything in the nature of coaching, would be most reprehensible there was no rule that witnesses should not refresh their memories before giving evidence. However, statements should not be read to witnesses in each other's presence and if pressure were brought on a witness to refresh his memory an allegation of coaching might be difficult to refute...."*

Having considered the circumstances in this case, I am unable to conclude that any substantial prejudice was caused to the petitioner on account of the above. Further I am satisfied with the reasons given by the Court of Appeal in paragraph 29 of their judgment in arriving at the conclusion that no prejudice was occasioned to the petitioner.

[41] The complaint in ground 9 is pertaining to the abuse of powers by the DPP office in handling the case. In the absence of any material with regard to such an abuse, this ground cannot succeed. For the reasons given, grounds 7 and 9 are also rejected.

**Grounds of Appeal against Sentence submitted to this Court**

[42] Ground 1 is only a bare statement to the effect that the Court of Appeal has erred in law in paragraph 63 of their judgment. But no reasons are given clarifying the basis of this complaint. However, I shall proceed to consider the aforesaid paragraph 63. By the said paragraph , having considered all the circumstances of the case it is concluded that, they were not inclined to interfere with the sentence imposed on the petitioner, as one of the purposes of sentencing is to deter offenders or other persons from committing same or similar offences. It is noted that due attention had been paid by them even to the two matters wrongly considered as aggravating factors. Their stance had been that even when those two factors were disregarded, 11 years head sentence with a non-parole of 9 years is fully justified. Further they had been inclined to the view that there were no

exceptional circumstances for the court to revise the sentence imposed by the High Court. For the above reasons they had concluded that sentence has not caused any substantial miscarriage of justice to the petitioner. On the above footing, appeal on sentence had been dismissed. The aforesaid paragraph 63 is reproduced below:

> *"63. Therefore, considering all the circumstances of the case I am not inclined to interfere with the sentence imposed on the Appellant as one of the purposes of sentencing is to deter offenders or other persons from committing same or similar offences. I think even when the two matters wrongly considered as aggravating factors are disregarded still the sentence of 11 years imprisonment with a non parole period of 9 years is fully justified. The sentence is not excessive. There are no exceptional circumstances for this Court to revise it. The sentences have not caused any substantial miscarriage of justice to the Appellant and I reject this ground of appeal".*

I am satisfied with the reasons spelt out in the above paragraph. Thus above ground should fail.

[43] In the Court of Appeal the only ground against sentence had been that "the sentence imposed by the trial court is extremely harsh and excessive." This ground has been dealt with, in the impugned Court of Appeal judgment from paragraphs 46 to 63.

[44] In this Court the petitioner has submitted 6 grounds of appeal against the sentence. Out of those, only 1 to 4 appear to be the substantial grounds on which the sentence is challenged. Since the complaints raised in grounds 2 – 4 are all against the non-parole period, those will be considered together.

[45] The 2nd ground is that the trial Judge erred in law in not declining to fix the non-parole term too close to the head sentence that failed to give effect to the rehabilitation of the petitioner and denied the opportunity to rehabilitate him. The 4th ground is that he erred in law in setting the non – parole period more than 75% of the head sentence without giving any reasons.

[46] The first count on which the appellant was convicted is incest contrary to Section 178(1) of the Penal Code Cap.17. The Count nos. 2 and 3 had been on Incest contrary to Section 223 of the Crimes Decree No. 44 of 2009 (CD). The statutory penalty for incest as per Section 223(1) of the above decree is imprisonment for 20 years. If the victim is under the age of 13 years, the offender shall be liable to imprisonment for life. The Sub - section 223(1) and (2) of the Crimes Decree are reproduced below:

> *"223.—(1) Any person who has carnal knowledge of another person, who is to his or her knowledge in a relationship to him or her of parent, grandparent, child, sister or brother, is guilty of an indictable offence.*
>
> *Penalty — Imprisonment for 20 years, but if it is alleged in the information or charge and proved that the person is under the age of 13 years, the offender shall be liable to imprisonment for life.*
>
> *(2) It is immaterial that the carnal knowledge was had with the consent of the other person".*

[47] At this juncture, consideration of Section 18 of the Sentencing and Penalties Decree 2009 would be relevant. The said section 18 thus reads as follows:-

> *"18 (1) 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.*
>
> *(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).*
>
> *(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.*
>
> *(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.*
>
> *(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect*

*of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.*

*(6)....*

*(7)...."*

[48] In view of the above Section 18(4) the non-parole period must be at least 6 months less than the term of the sentence.

[49] I opt to cite the principles of law enunciated in **Bogidrau v State** [2016] FJSC 5; CAV 0031.2015 (21 April 2016), when considering the length of the non-parole period. It was to the following effect:

> "6. Section 18(4) of the Sentencing and Penalties Decree provided that the non-parole period had to be at least 6 months less than the head sentence, and a number of authorities have addressed how long the non-parole period should be, subject, of course, to that provision. Two principles can be identified:
>
> *(I) "[The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent": per Calanchini P in* ***Tora v The State*** *[2015] FJCA 20 at [2].*
> *(ii) "[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. It will be wholly ineffective if a minimum sentence finishes prior to the earliest release date if full remission of one third is earned. Experience shows that one third remission is earned in most cases of those sentenced to imprisonment":* ***Raogo****, op cit, at [24]".*

[50] In the case at hand the head sentence for each count (1-3 counts) the learned High Court judge had picked the starting point as 12 years. Thereafter he had proceeded to add 3 years for the aggravating circumstances and deduct 4 years for the mitigating circumstances. The resulting position was that the head sentence was fixed at 11 years. As stated in paragraph 21 of the above judgment, acting in terms of section 18(1) of the Sentencing and penalties Decree, non-parole period

had been fixed at 9 years. As per Para 46 of the impugned judgment the petitioner had admitted that the trial judge had not erred in terms of the tariff. His complaint in the Court of Appeal had been that the two aggravating factors – namely the petitioner being the father of the victim and that the petitioner had sexual intercourse with the victim cannot be considered as aggravating factors because they are part and parcel of the 1st to 3rd counts. By paragraph 63 it is concluded that even when the above two wrongly considered factors are disregarded still, the sentence passed in this case is fully justified and it is not excessive. Having considered the evidence and all the circumstances of this case, I agree with the above finding of the Court of Appeal.

[51] Furthermore, the non-parole period is in accordance with the provisions in Section 18(4) of the above Decree. The non-parole period here is 2 years less than the term of the sentence. Since the non – parole period is in accordance with the above sec. 18(4) I find no merit in ground 4.

[52] Next ground urged by the Petitioner was that when fixing the non-parole period the learned High Court Judge had failed to consider the rehabilitation of the Petitioner. In this regard, the principle of law enunciated in ***Doreen Singh v The State*** *[2016] FJCA 126; AAU009.2013 (30 September 2016)* would lend assistance. The Court of Appeal proceeded to conclude that:

> *"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."*

[53] At this juncture I am mindful of the observations made by New Zealand Court of Appeal in the case of **The Queen v. Radich**; NZLR 1954 p.86 to the following effect:

*"One of the main purposes of punishment is to protect the public from the commission of crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. The fact that punishment does not entirely prevent all similar crimes should obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct, of the individual offender, and the effect of the sentence on this, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment."*

[54] In the light of the above, I am unable to conclude that the Petitioner has been deprived and/or denied of the opportunity to rehabilitate himself.

[55] When revising sentences, an appellate tribunal must be reasonably satisfied that the sentence imposed is manifestly excessive or wrong in principle or there exist exceptional circumstances demanding its revision. For the aforesaid reasons, I am not convinced that any of the grounds submitted against the sentence in this Court could succeed. Thus all the above grounds raised with regard to the appeal against sentence are rejected.

[56] It is needless to stress that this Court being the final Appellate Court, special leave to appeal should be granted only in cases which crosses the threshold stipulated in section 7(2) of the Supreme Court Act 14 of 1988. The petitioner has failed to satisfy Court with regard to above. Special leave to appeal is therefore refused. The Judgment of the Court of appeal dated 30/09/2016 is hereby affirmed.

**The Orders of the Court:**

1. Petitioner's application for special leave to appeal is refused.
2. The Judgment of the Court of Appeal dated 30/09/2016 is affirmed.
3. Conviction and sentence also affirmed.

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**Hon. Chief Justice, Anthony Gates**
**President, Supreme Court**


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**Hon. Mr. Justice Suresh Chandra**
**Justice of Supreme Court**

.....

**Hon. Madam Justice Chandra Ekanayake**
**Justice of Supreme Court**

Solicitors:

Petitioner in Person
The Office of the Director of Public Prosecutions for the Respondent.