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

CRIMINAL APPEAL AAU 0061 OF 2013
(High Court HAC 34 OF 2010(Lautoka)

BETWEEN : **SOLOMONI NAQOLI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka JA**
A. Fernando JA
Rajasinghe JA

Counsel : **Mr Waqainabete for the Appellant**
Mr Vodokisolomone for the Respondent

Date of Hearing : **5 May 2017**

Date of Judgment : **26 May 2017**

JUDGMENT

Prematilaka JA

[1] I agree with the reasons and conclusions arrived at by Fernando JA.

Fernando JA

[2] The Appellant has appealed against his sentence of 11 years imprisonment with a non-parole period of 9 years imposed upon him by the High Court of Fiji sitting at Lautoka; upon his conviction on his own plea of guilt; for the offence of Rape contrary to section 207(1)(b) of the Crimes Act 2009.

[3] There is only one ground of appeal, namely that "The learned Trial Judge erred in fact when he failed to discount the term of more than three years which was the period the Appellant spent on remand from the final sentence of the Appellant".

[4] Leave had been granted to him by a single Judge of this Court to appeal against the sentence in accordance with section 21(2)(c)of the Court of Appeal Act 1949.

[5] Leave to appeal had been granted on the basis that "The failure to deduct the period spent in remand by the Appellant when he was sentenced was an error".

[6] The State has conceded to the appeal and invited the court to correct the sentence.

[7] **Section 23(3) of the Court of Appeal Act 1949** states:

> "*On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just.*"

[8] In **Naisua v State [2013] FJSC 14; CAV 0010.2013** the Supreme Court affirmed the principle set out in **House v The King [1936] 55 CLR 499**, that an appellate court will only interfere with a sentence where it is demonstrated that the trial judge had made one of the following errors, namely:

i. Acted upon a wrong principle;
ii. Allowed extraneous or irrelevant matters to guide or affect him,

iii. Mistook the facts;

iv. Failed to take into account some relevant consideration.

[9] The ground of appeal raised shows that the Learned Sentencing Judge had failed to take into account the provisions of section 24 of the Sentencing and Penalties Act, which is both an error of law and fact.

[10] **Section 24 of the Sentencing and Penalties Act 2009** states:

> "*If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.*" (emphasis added)

[11] This is a long standing practice of Sentencing Courts, to make an appropriate reduction in sentence for time spent in custody prior to sentence of an offender, that was codified in 2009. However it is to be noted that it is only the period the offender had been in custody in respect of the offence for which he was convicted and sentenced that needs to be taken into account. A period of time an offender may have spent in custody for another offence shall not be taken into account.

[12] In **Tevita Banuve v State [2014] FJCA 209; AAU 0095.2012**; "*Remand period is a relevant consideration that must be taken into account by the court exercising sentencing discretion. Section 24 of the Sentencing and Penalties Decree endorses the principle of making allowance for remand period in sentence. The failure by the leaned magistrate to take the appellant's remand period was an error*". This statement was adopted in the case of **Etuate Sugutururaga v State [2014] FJCA 206; AAU0084.2010**.

[13] In the case of **Paulasi Mataunitoga v State [2015] FJCA 70; AAU125.2013** this Court held following the decisions in **R v Newman & Simpson (2004) 145 A Crim R 361 and R v Youkhana [2005] NSWCCA 231**, that the period spent in custody should be deducted not only from the head sentence but also from the non-parole period fixed by the Sentencing Court.

[14] The Court record bears out that the Appellant had been produced before the Magistrates Court of Nadi on the 24th of March 2010 and remanded to custody. He had continued to be on remand until he was produced before the High Court of Lautoka on the 5th of May 2010. Thereafter the Appellant had continued to be on remand until he was released on bail by the High Court on the 21st of May 2010. He had continued to be on bail till the 9th of September 2010. On the 9th of September 2010 the Appellant's bail had been revoked for breach of a bail condition and remanded to custody. The Appellant had been convicted on his plea of guilty on the 12th of April 2013 and sentenced on the 16th of May 2013. It is clear that the Appellant had been on remand from the 9th of September 2010 up to the date of his sentence, a period of 2 years, 8 months and 7 days.

[15] Counsel for the State has, in his Written Submissions filed before this Court, said;

> *"The Appellant's bail was revoked by the Lautoka High Court on 9th September 2010 (page 60 of the Court Record) and he was sentenced on 16th May 2013. The Appellant was remanded in custody, for two(2) years and eight (8) months."*

He has not referred to the period 24th March 2010 to the 21st of May 2010 where the Appellant was held in custody. This period of 58 days the Appellant was held in custody should also be regarded by Court as a period of imprisonment already served by the Appellant.

[16] Therefore I am of the view that a period of 2 years, 10 months and 5 days should be deducted from the sentence of 11 years that was imposed on the Appellant on the 16th of May 2013 and the non-parole period reduced by the same amount.

Rajasinghe JA

[17] I agree.

Orders of the Court

(i) *The appeal against sentence is allowed*

(ii) *The Appellant to serve a period of 8 years, 2 months and 5 days imprisonment, as from the 16th of May 2013*

(iii) *The Appellant will not be eligible to be released on parole during the period of 6 years, 2 months and 5 days from the 16th of May 2013.*

COURT OF APPEAL FIJI

Hon Mr Justice C. Prematilaka
JUSTICE OF APPEAL

Hon Mr Justice A. Fernando
JUSTICE OF APPEAL

Hon Mr Justice T. Rajasinghe
JUSTICE OF APPEAL