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

CRIMINAL APPEAL AAU 0112 OF 2014
(High Court HAC 102 of 2012)

BETWEEN : **SUBRAMANI**

Appellant

AND : **THE STATE**

Respondent

Coram	:	**Calanchini P** **Gamalath JA** **Bandara JA**
Counsel	:	**Mr M Fesaitu for the Appellant** **Mr S Vodokisolomone for the Respondent**
Date of Hearing	:	**18 May 2018**
Date of Judgment	:	**1 June 2018**

JUDGMENT

Calanchini P

[1] The appellant was charged with two counts of rape contrary to section 207(1) 2(a) and 2(b). The particulars of the first count were that between 1 and 31 May 2012 at Yalava the appellant penetrated the vagina of a girl (the complainant) age 11 years with his

finger. The particulars of the second count were that between 1 and 31 May 2012 at Yalava the appellant penetrated the vagina of a girl (the complainant) aged 11 with his penis.

[2] Up to the commencement of the trial on 29 November 2013 the appellant had maintained his plea of not guilty to both counts. However after the complainant had been cross-examined the appellant changed his plea to guilty on both counts.

[3] The appellant was subsequently convicted on his plea of guilty to both counts. On 5 December 2013 the appellant was sentenced to terms of imprisonment of 11 years and 9 months on each count to be served concurrently with a non-parole term of 10 years.

[4] The appellant subsequently filed a notice of appeal against conviction and sentence which, although drafted and submitted to the Corrections Office within time, was filed about 21 days out of time. On 27 April 2015 the Legal Aid Commission filed an amended notice relying on one ground of appeal against sentence which provided:

> *"The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment."*

[5] It would appear that the appellant had abandoned his appeal against conviction. Having read the transcript of the complainant's evidence it would appear that there was no evidence before the court to establish the first count of rape by penetration of the complainant's vagina with the finger. This omission was not the subject of either cross-examination or re-examination. In the summary of facts that was presented by the respondent to the Court after the appellant's change of plea to guilty the incident is stated as follows:

> *"He then came on top of her and _ _ _ then used his hands to forcefully penetrate the complainant's vagina. Afterwards he then forcefully inserted his penis into her vagina."*

[6] Although the material before the Court was not entirely convincing in relation to count 1 it must be acknowledged that the appellant as the adult who committed the offences was in the best position to recall what he had done on that day and as a result his unequivocal plea of guilty to both counts cannot be doubted. His subsequent appeal against conviction will be marked as having been abandoned and will be dismissed.

[7] On 13 August 2015 a judge of the Court granted an enlargement of time and lave to appeal against sentence.

[8] In his sentencing decision the learned Judge summarized the background facts which summary is now reproduced. The complainant was the appellant's grand-niece as he and her grandfather are bothers. Between 1 and 31 May 2012 the appellant was visiting the complainant's house to attend her grandmother's funeral. Sometime during that period on a Saturday during the day, the complainant was in one of the three bedrooms while her cousins were watching movies in the living room. At that time the complainant was 11 years old and was in class 6. The appellant was in another room and called the complainant's name. The complainant went to the appellant and asked him what happened. She was wearing a blue and white top, white vest, skirt, black tights and red underwear. As soon as she got to him, the appellant pushed her on to the bed in the room and as a result her skirt went up. He then came on top of her and forcefully removed her black tights and her underwear while leaving on her top. He then used his hands to forcefully penetrate the complainant's vagina. Afterwards, he then forcefully inserted his penis into her vagina. She felt it was painful and also felt blood coming from her vagina. After about 10 seconds the complainant pushed the accused away onto the bed before grabbing her clothes and running away to her room.

[9] The ground of appeal is concerned with what is claimed to be the close proximity of the non-parole period of 10 years imprisonment to the head sentence of 11 years and 9 months imprisonment.

[10] The power to fix a non-parole period is set out in section 18 of the Sentencing and Penalties Act 2009. So far as is relevant to the present appeal section 18 states:

> *"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) - (7) ___"*

[11] The sentencing court is required to fix a non-parole period which is at least 6 months less than the head sentence where the head sentence imposed is more than 2 years unless the court considers that the nature of the offence or the past history of the offender makes the fixing of a non-parole period inappropriate. The court is not required to give reasons for imposing a non-parole term since the requirement is mandatory. However the court is required to give reason if it considers it inappropriate to fix a non-parole term.

[12] There is authority for the proposition that the purpose of fixing a non-parole period is to record the sentencing court's perception of the minimum term of imprisonment to be served before the offender becomes eligible for release: **Zamfirescu v R** [2012] VSCA 157, **Kumora -v- The Queen** [2012] VSCA 212, **Naitini and Others –v- The State** [2015] FJCA 154 AAU 102 of 2010 (3 December 2015). In **Doreen Singh –v- The State** [2016] FJCA 126 AAU 9 of 2013 (30 September 2016), this Court concluded that the earlier authorities stood for the proposition that:

"The non-parole period was intended to be the minimum period which the offender would have serve so that he or she would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission."

[13] It would appear that where a sentencing court considers it inappropriate to fix a non-parole term it is in effect saying that there is no minimum term that the offender is required to serve before being considered eligible for release. It is difficult to conclude that section 18(2) should be read as meaning that the decision not to fix a non-parole term requires the offender to serve the head sentence before being eligible for release. There is no basis for keeping the offender incarcerated once he has served the period of imprisonment imposed as the head sentence. In other words when the court considers it inappropriate to fix a non-parole term, the offender is eligible to be considered for parole at any time and furthermore any remission to which the offender is entitled is effectively calculated on the head sentence from the date the sentence is imposed not from the date of having completed the non-parole term of the sentence.

[14] In the present case the non-parole term was 1 year and 9 months less than the head sentence. Both the head sentence of 11 years 9 months and the non-parole sentence of 10 years are both at the lower end of the accepted tariff for rape of a minor.

[15] The offence of rape of young person related to the appellant is a serious offence. In this case the complainant was 11 years old and the appellant was her grand uncle (her grandfather's brother). The authorities indicate that whilst rehabilitation is a factor to be considered when fixing a non-parole period, so also are deterrence, denunciation, condign punishment and community protection and expectations. The appropriate person to balance these objectives in each case is the sentencing judge. In the present case, given the age of the appellant, re-habilitation is not a particularly relevant matter whereas the expectations of the community and the protection of young girls should be reflected in

both the head sentence and the non-parole term so as to send a strong signal that the counts will impose appropriate sentences in such cases.

[16] I do not consider that the sentencing judge has erred in fixing the non-parole term in the present case at 10 years and as a result I would dismiss the appeal.

Gamalath JA

[17] I agree.

Bandara JA

[18] I agree with the reasoning and conclusions of Calanchini P.

Orders:

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

Hon. Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice W Bandara
JUSTICE OF APPEAL