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

CRIMINAL APPEAL NO. AAU 036 of 2022
[In the High Court at Suva Case No. HAC 29 of 2018]

BETWEEN	:	**AMELE WABALE**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. R. K. Boseiwaqa the Appellant**
	:	**Mr. J. Nasa for the Respondent**
Date of Hearing	:	**08 March 2024**
Date of Ruling	:	**11 March 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka on one count of rape, one count of sexual assault and one count of indecent assault contrary to the Crimes Act. The charges were as follows:

*'**COUNT ONE***

Statement of Offence

***RAPE**: Contrary to section 207 (1) and 2 (b) of the Crimes Act, 2009.*

Particulars of Offence

AMELE WABALE on the 8th day of February, 2018 at Nadi in the Western Division penetrated the vagina of "C.H" with her fingers without her consent.

COUNT TWO

Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

AMELE WABALE on the 8th day of February, 2018 at Nadi in the Western Division unlawfully and indecently assaulted "C.H".

COUNT THREE

Statement of Offence

INDECENT ASSAULT*: Contrary to section 212 (1) of the Crimes Act, 2009.*

Particulars of Offence

AMELE WABALE on the 8th day of February, 2018 at Nadi in the Western Division unlawfully and indecently assaulted "C.H".

[2] The High Court judge convicted the appellant and on 17 May 2022 sentenced him to an aggregate period of 07 years and 08 months of imprisonment with a non-parole period of 07 years.

[3] The appellant's appeal against sentence is timely.

[4] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction 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] Further 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].

[6] The trial judge had summarized the facts in the sentencing order as follows:

> *2. The brief facts were as follows:*
>
> *In the morning of 8th February, 2018 the victim and the accused arrived at their flat after clubbing. They were flat mates and after exchange of some jokes the victim agreed for the accused to come and sleep beside her on her single bed.*
>
> *3. Unbeknown to the victim, the accused went on top of her and forcefully started kissing her mouth. The victim pulled back and asked the accused what she was doing. The accused said not to make any noise to wake Vasiti the other flat mate. The victim tried to push the accused, but could not, at this time she felt the accused hand block her mouth to stop her from making any noise.*
>
> *4. The accused did not stop but forcefully continued kissing the victim's neck, breast and then made love bites on her breast and chest. The accused also pulled down the victim's panty and then put her fingers into the victim's vagina. The victim tried to get out of her bed but the accused held her down.*
>
> *5. Finally, the accused forcefully put her mouth on the victim's vagina and sucked it. The victim felt uncomfortable and she did not consent to what the accused was doing to her. All this happened in 3 to 4 minutes.*

[7] The ground of appal urged by the appellant is as follows:

> ***Sentence***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in fact when fixing a non-parole period close to the head sentence without considering the purpose of rehabilitation which outweighed the purpose of deterrence under section 4 (1) of the Sentencing and Penalties Act 2009.*

Ground 1

[8] The trial judge had given his reason for imposing the impugned non-parole period as follows in the sentencing order.

22. *Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 7 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.*

[9] The appellant's argument is that the non-parole term is too close to the head sentence as to deny or discourage the possibility of her rehabilitation and she relies on **Tora v The State** [2015] FJCA 20; AAU0063.2011 (27 February 2015) para 2 where Calanchini P (as he then was) said:

> *"The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent."*

[10] Neither the legislature nor the courts have said otherwise on the above position since then despite the scrutiny to which the non-parole period has been subjected [see **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023)].

[11] Corrections Service (Amendment) Act 2019 has left the first part of the observations by Gates, J in ***Timo*** (**Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22) that judicial officers need to justify the imposition of non-parole periods close to the head sentence.

[12] The Court of Appeal dealt with complaint similar to that of the appellant in **Navuki v State** [2022] FJCA 25; AAU038.2016 (3 March 2022) where the trial judge had sentenced the accused to 16 years of imprisonment with a non-parole period of 15 years on the charge of rape and stated as follows:

> **'***[40] Just as Gates, JA did in **Timo**, the Court of Appeal in **Prasad v. State** AAU 0010 of 2014: 04 October 2018 [2018] FJCA 152 earlier held that a trial judge exercising discretionary power should ordinarily justify or give reasons for the decision, particularly when non-parole period is fixed very close to the head sentence. But, the Court added that there may be cases where the decision to fix the non-parole period close to the head sentence is fully justified on the facts and circumstances of the case. Finally, the Court following the Supreme Court decisions in **Kean v State** CAV0007 of 2015: 23 October 2015[2015] FJSC 27 and **Bogidrau v State** CAV0031 of 2015: 21 April 2016 [2016] FJSC 5 did not interfere with the fixing of the non-parole period 09 months less than the final*

sentence as it did not find overwhelming reasons to do so, coupled with the fact that the trial judge was in the best position to decide on the matter.'

[13] The effect of section 27 of the Corrections Service Act 2006 (after the amendment) is that the Commissioner has to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence ***or*** has completed her non-parole period, ***whichever is the late*** [vide **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023) & **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023)].

[14] As pointed out above, the trial judge had considered the non-parole period of 07 years to be appropriate in the rehabilitation of the appellant and just in the circumstances of this case. There is no complaint on the part of the appellant as to the head sentence of 07 years and 08 months (92M). If the appellant continues to be of "good behaviour" she will receive 1/3 remission (02 years and 07 months; rounded from 6.67M) and will have been released once she has served two-thirds of the head sentence (05 years and 01month; rounded from 1.33M) which means that she will likely to be released after serving 05 years and 01 month. However, her non-parole will be completed only in 07 years and therefore she will have to serve a term of 07 years mandatorily before her release despite her remission. Thus, the current non-parole period will have a significant impact on her date of release.

[15] Although, by itself the non-parole period is legal and in conformity with section 18(4) of the Sentencing and Penalties Act, since the trial judge does not seem to have considered the principle in ***Tora*** as reiterated in ***Navuda*** in fixing the non-parole period of 07 years, I consider it as a sentencing error and allow leave to appeal on that point so that the full court may revisit the non-parole period.

Order of the Court:

1. Leave to appeal against sentence is allowed.

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

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent