IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION NO: CAV 0021/2016
(On Appeal From Court of Appeal No: AAU 08/2011)

BETWEEN : **SAIMONI TUKANA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Mr. Justice Sathyaa Hettige, Judge of the Supreme Court
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

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

Date of Hearing: **12 October 2016**

Date of Judgment: **27 October 2016**

JUDGMENT

Gates, P

1. I have read in draft the two following judgments. I agree with the way the error in the final orders is to be dealt with, and the proposed final orders.

Sathyaa Hettige, J

2. The petitioner with one other was jointly charged with "attempted robbery" contrary to sections 44 (1) and 310 (a) (i) of the Crimes Decree No. 44 of 2009 in counts 2 and 3 and was jointly charged with murder contrary to section 237 of the Crimes Decree No. 44 of 2009 in count 5. The petitioner was charged separately with the

offence of theft contrary to section 291 (1) of the Crimes Decree No. 44 of 2009 in count 4.

3. On 4th July 2011 the petitioner pleaded guilty to the charge of theft and after trial which extended for 18 days the majority of the assessors expressed the opinion that the petitioner was guilty of manslaughter and the assessors unanimously expressed the same opinion on the attempted robbery charge against the petitioner.

4. The learned trial Judge concurred with the opinions of the assessors and convicted the petitioner on one count of manslaughter, one count of attempted robbery and one count of theft and on the 12th August 2011. The petitioner was sentenced to 12 years of imprisonment with a non-parole period of 10 years for manslaughter, 9 years of imprisonment for attempted robbery and 9 months imprisonment for theft and all the sentences were ordered to be served concurrently. The petitioner filed a separate application seeking leave to appeal which was 6 days out of time in the Court of Appeal against the decision of the High Court against the conviction and sentence.

5. The single Judge of the Court of Appeal granted leave to Appeal the petitioner's conviction and sentence to the Court of Appeal on the 26th March 2014. The Full Court of Appeal allowed the petitioner's appeal against the sentence and dismissed the appeal against the convictions on 26th February 2016.

6. The Court of Appeal by allowing the sentence appeal reduced the sentence of 12 years imposed for manslaughter to 10 years with a non-parole period of 7 years. The sentence of 9 years for attempted robbery remained unchanged. However, the Court of Appeal referred to the sentence for the manslaughter as 9 years with a non-parole period of 6 years in its final order.

7. The petitioner in the present application is seeking a clarification of the substituted sentence 9 years with a non-parole period of 6 years for manslaughter as it is not reflected in the Court of Appeal Judgment whether the discount for the remand period of 15 months the petitioner spent has been considered and given. The petitioner by the

petition dated 21 July 2016 further requests to make a proper adjustment of calculating the sentence already substituted by the Court of Appeal with effect from 12th May 2010 which is the date the petitioner was remanded.

8. It is relevant to refer to the facts of this case briefly before dealing with the issue before court.

Factual Matrix

9. On the 4th May 2010, the petitioner with others were drinking alcohol (beer and rum) rolls of marijuana were also smoked at the Jittu Estate Youth Hall and drinking went on until late in the afternoon . The petitioner decided to go to No. 65 Shalimar Street, Samabula to loan some money from a friend who resided at the address to buy more alcohol after 5 pm on that day. Krishneel Singh (the deceased) Rajinesh Chand and Ashwin Chand were finishing their studies at Fiji National University ,Samabula at the time Krishneel's father requested him to go and pick up his tools at his house at 67 Shalimar Street , Samabula. Krishneel was driving a white station wagon, registration No. FP 351. Rajinesh was seated in the front seat while Ashwin was sitting behind him in the back seat. Krishneel parked his vehicle in the driveway and walked down the driveway towards the house. The petitioner with another was standing outside no. 65 Shalimar Street beside Krishneel's vehicle.

The petitioner with other person using force attempted to steal money from Rajinesh and attacked him. The other person by the name of Salesi attempted to rob Ashwin. Then Krishneel returned carrying a spade and on seeing his friends being attacked by the petitioner hit the petitioner with the spade.

They all struggled for the spade and the petitioner repeatedly attacked the deceased on the head and body. The petitioner kicked the deceased on the head and punched him to the ground. Salesi , the other person who joined the petitioner to attack the deceased was angry and continued to hit the deceased's head with the spade. The

petitioner came and stopped Salesi and took him away. Krishneel died at the CWM hospital due to serious skull and brain injuries.

Petitioner's Grievance

10. The crux of the petitioner's grievance is that there is no clear expression reflected in the Court of Appeal Judgment that the remand period of 15 months he spent from 12th May 2010 to 12th August 2011 was discounted when making the final order.

11. In order to deal with the petitioner's complaint, it is relevant to consider the provisions contained in section 24 of the Sentencing and Penalties Decree 2009 which the sentencing court has to regard the period of time spent by the offender in remand as a term of imprisonment already served by the offender when sentencing the offender.

12. Section 24 of the Sentencing and Penalties Decree 2009 provides as follows:

> *"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 as a period of imprisonment already served by the offender."(Underlining is mine) This is a mandatory requirement to be complied with by court when sentencing an offender.*

13. In the present case before this court we observe that the Court of Appeal has substituted a reduced head sentence of 10 years with a non-parole period of 7 years for manslaughter in Paragraph 51 of the Judgment but referred to a term of 9 years with a non-parole period of 6 years in the final order of the Judgment. As there is no specific paragraph in the Appeal Court judgment stating as to why a further reduced sentence of 9 years has been imposed there appears to be some ambiguity. It appears from the order made in the Court of Appeal Judgment that there is a difficulty and unnecessary burden for the Prison Authorities to take any administrative decisions when dealing with the petitioner's early release after the non-parole period is served .

14. The working of the provisions in section 24 of the Sentencing and Penalties Decree 2009 was discussed and clearly explained by His Lordship Gates J in **Apakuki Sowane** v **State** (S.C. Appeal Case No. CAV 0038/2015 decided on 21/04/2016)

Paragraph 10 of the Judgment is reproduced as follows:

"*However, section 24 does not cast any burden on the Corrections Department .The burden is cast upon the court. The provision is mandatory. For the court shall regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender , "unless a* ***court*** *otherwise orders.*"

15. The Supreme Court in paragraph 14 of the Judgment further observed that,

"*However, the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. In doing so it is not necessary to make exact allowance for days or even weeks spent on remand. It depends upon its total significance. In Basa* ***v The State*** *Crim.* ***App. No. AAU0024.2005, 24 March 2006*** *the offender had spent 1 year 1 month and 14 days in custody awaiting trial. The Judge had allowed of that period only 1 year to be deducted from his sentence. The court said:*
" when calculating the appropriate sentence for any offence , the Judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was perfectly proper amount." (Emphasis is mine)

16. In this case we observe that the Court of Appeal has referred to the sentencing decision of the trial Judge in paragraph 50 of the Judgment which is reproduced as follows:

"*The second appellant Tukana submits that his time spent in remand was not taken into account by the trial Judge. It is apparent from the sentencing decision that the learned Judge has not made reference to the period of 15 months spent in remand. That ground of appeal succeeds.*"

17. The Court of Appeal has allowed the ground of Appeal urged by the petitioner on failure of the trial Judge by not taking into account the 15 months period spent on remand when sentencing. In paragraph 51 of the Judgment Court of Appeal states that that the trial Judge has erred by selecting a higher starting point within the tariff

applicable for manslaughter following the decision in **Kim Nam Bae v The State (1999) FJCA 21; AAU 15 of 1998** (26 February 1999) and then adding a further 6 years for aggravating factors some of which must have been considered in selecting the high starting point. Court of Appeal further said that the trial Judge has not explained how he arrived at a starting point of 9 years which is certainly at the higher end of the accepted tariff for manslaughter at the time.

18. It is worth referring to the above case in **Kim Nam Bae** (supra) because the court in that case discussed the issue of sentencing discretion of the trial Judge for manslaughter on a complaint made by the petitioner. In that case the appellant was initially charged in the High Court with murder. After that the prosecution had changed and replaced it with a charge of manslaughter. He pleaded guilty to the offence and was sentenced to serve 6 years imprisonment

19. The facts in the above (Bae) case can be stated briefly as follows which shows how violent the act committed by the prisoner was.

> *"The prisoner and the deceased came to Fiji to start a restaurant business. They lived as man and wife. As often happens in business, financial pressures fell on them. Monies were borrowed through friends. There came difficulties with repayments. This added to the pressures. Those pressures soon caused disharmony in the relationship.*
> *On the 4th February the deceased opened the restaurant and then went to Nadi to see a friend (a Korean man) She returned with $1000.She would not tell the prisoner where she got the money from.. During her absence, the prisoner had imbibed of alcohol. He was thus in no mood for nor had any tolerance of any explanation from the deceased. An argument erupted. This soon descended into a fight when the deceased tried to stop the prisoner from drinking....The prisoner punched and kicked the deceased, pulled her around by the hair and hit her across the head with a 2 liter plastic juice bottle which it seems was filled (to some degree or another) with water. The deceased became unconscious. The prisoner even in his intoxicated state must have then realized the gravity of his actions. He called for help. ....Regrettably the deceased died in hospital some short time later."*

The court considered that the facts of above case called for a deterrent sentence.
In the Bae case (supra) the court observed that " *...The task of sentencing is not an exact science in any case which is capable of mathematical calculation This is particularly so with manslaughter where the circumstances and offender's*

culpability can vary greatly from case to case. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations..."

20. In the present case we observe that the petitioner was found guilty of manslaughter after full hearing before the assessors. The Court of Appeal specifically observed in paragraph 51 that the trial Judge has erred in selecting a high starting point within the tariff applicable for manslaughter. Further the Court of Appeal also considered the period of 15 months spent in remand which had not been considered by the Trial Judge.

21. It appears on a careful reading of the same paragraph that the learned Judges of the Court of Appeal by allowing the appeal against the sentence for manslaughter re-sentenced the petitioner to a term of 10 years with 7 years of non-parole period and further said that the sentence of 10 years imprisonment should be a head sentence with 7 years non-parole period. By relying on the Judgment in **Kim Nam Bae** case above referred to I agree with the Court of appeal Judges' view that the trial Judge has selected the high starting point of the tariff applicable for manslaughter. Therefore I concur with the deduction of initial head sentence of 12 years to a term of 9 years imprisonment with a non-parole period of 6 years which would be in accordance with the law. Furthermore we observe that the sentence of 9 years imprisonment with 6 years non-parole period made in the final order in the judgment seems to us that the court has considered the 15 months remand period spent by the petitioner. Due to a bona fide lapse on the part of the Court of Appeal it has not been clearly set out. However, though the appeal against the sentence has been allowed, there is no reference made by the Court of Appeal to the period of 15 months spent in remand which has given rise to some ambiguity.

22. It is to be noted that at the time of hearing this matter a note addressed to the Chief Registrar with copy to his Lordship the Chief Justice explaining the correct position by one of the Court of Appeal Judges who was in the Panel of Judges hearing the Appeal was submitted to court. However, that note cannot be considered by this court as other Judges did not have the opportunity to read the said note.

Conclusion

23. In view of the above issue raised by the petitioner in this application seeking leave we reach the conclusion that the petitioner has satisfied this court that there is a substantial question of principle affecting the administration of criminal Justice under section 7 (2) (b) of the Supreme Court Act and special leave should be granted and the relief sought by the petitioner should be clarified.

Keith, J:

24. I agree that leave to appeal should be given because it is necessary for the sentence which the petitioner received to be clarified, but I also agree that his appeal should be dismissed. I add a few words of my own only to explain why the Supreme Court cannot give effect to a note from one of the judges in the Court of Appeal.

25. The sentence passed on the petitioner needed to be clarified because of an inconsistency between a passage in the Court of Appeal's judgment and the order which purported to give effect to the judgment. o Para 51 of the judgment substituted, for the sentence passed by the trial judge for the offence of manslaughter, "a head sentence of 10 years imprisonment with a non-parole term of 7 years". However, the order purporting to give effect to that said:

> *"The Appeal against sentence by Tukana is allowed in respect of the sentence for manslaughter. Tukana is sentenced to 9 years imprisonment with a non-parole term of 6 years."*

26. That inconsistency needed to be resolved. Otherwise the prison authorities would not be able to calculate the petitioner's release date. Calanchini P (who gave the leading judgment with which the other members of the Court of Appeal agreed) was asked to clarify what sentence the Court of Appeal had intended to substitute for that of the trial judge. Calanchini P duly responded to that request. He said that he had intended to

substitute a sentence of 10 years imprisonment for the manslaughter with a non-parole term of 7 years and that the order had been incorrect.

27. Although this request and the response was entirely appropriate from an administrative point of view, it cannot be taken into account judicially. The Court of Appeal does not have the power to clarify in a judicial context what it meant in a judgment it had previously given. That would have the effect of opening the door, as the Court of Appeal in England said in *R v Cripps ex p Muldoon* [1984] 1 QB 686 at p 697D, to inviting "judges to succumb to the very human failing of regretting a decision and then convincing themselves that they cannot ever have intended it". Indeed, permitting the court to clarify what it meant would be inconsistent with the proposition that another court having to consider what an earlier court meant is required to disregard any evidence from the earlier court of what it had meant: see *Brennan v Prior and ors* [2015] EWHC 3083 (Ch) at [21]. In any event, Calanchini P was just one of three judges. We do not know what sentence the other two judges had intended should be substituted.

28. The inconsistency in the judgment is not one which we are able to resolve. We therefore have to give the petitioner the benefit of the doubt that the sentence for the manslaughter which the Court of Appeal substituted for that passed by the trial judge was 9 years imprisonment with a non-parole period of 6 years. I agree with Hettige J that such a sentence reflected an appropriate reduction to the sentence passed by the trial judge to take account of (a) the 15 months which the petitioner had spent in custody on remand awaiting his trial (which the trial judge did not say he had taken into account) and (b) the double counting on the part of the trial judge which the Court of Appeal thought had undermined the sentence which he had passed.

29. Since the appeal should be dismissed only because we are treating the sentence which the Court of Appeal substituted as one of 9 years imprisonment with a non-parole term of 6 years, we should declare that that was the sentence substituted by the Court of Appeal in addition to the orders which Hettige J proposes.

Sathyaa Hettige, J

30. Accordingly we make the following orders:

Orders of the Court

1. Special leave is granted.
2. The Court declares that the sentences passed by the Court of Appeal for an offence of manslaughter was 9 years imprisonment with a non- parole period of 6 years imposed by the Court of Appeal in the final order is affirmed.
3. Petitioner's appeal is dismissed.

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Hon. Chief Justice Anthony Gates
President of the Supreme Court

SUPREME COURT OF FIJI
FIJI

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Hon. Mr. Justice Sathyaa Hettige
Judge of the Supreme Court

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Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

Solicitors:

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