IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Criminal Petition No. CAV0016 of 2017
[on appeal from Court of Appeal Cr. App. No: AAU101/2013]
[High Court Case No: HAC 259/13S]

BETWEEN	:	**LEONE VERESA**
		Petitioner
AND	:	**THE STATE**
		Respondent

Coram	:	The Hon. Chief Justice Anthony Gates President of the Supreme Court
		The Hon. Mr. Justice Saleem Marsoof Judge of the Supreme Court
		The Hon. Mr. Justice Buwaneka Aluwihare Judge of the Supreme Court
Counsel	:	Petitioner in person Ms P. Madanavosa for the State
Date of Hearing	:	12th April 2018
Date of Judgment	:	27th April 2018

JUDGMENT OF THE COURT

Gates P

[1] On 17th July 2012 in the Nasinu Magistrates Court the Petitioner was convicted of rape contrary to sections 149 and 150 of the Penal Code. The offence was committed against his biological sister aged 23. On 25th January 2013 he was sentenced to 8 years imprisonment. The Magistrate had purported partially to suspend the sentence ordering imprisonment at the Corrections Centre for the weekends only. This was clearly an incorrect sentence, for the Penal Code only permitted the suspension of sentences of imprisonment where the term is for not more than 2 years [section 29(1) Penal Code]. The governing provision at date of sentence was section 26(2)(b) of the Sentencing and Penalties Act which had similar restrictions on suspension.

[2] The grounds of appeal against sentence were contained in a letter to this court. The Petitioner complains of:

(i) the declaration of the Magistrates Court sentence by the Court of Appeal as being unlawful;

(ii) the failure to consider section 18(2) of the Sentencing and Penalties Act before imposing the 7 year non-parole period, and that the sentence was harsh and excessive;

(iii) that the non-parole period was a penalty not in force at the time of the offence and therefore a breach of sections 392 and 393 of the Crimes Act.

The Facts

[3] When the matter of sentence was taken on appeal by the Director of Public Prosecutions to the High Court, the facts were related by the judge in his judgment as follows:

> "[6] The facts of the case were that the accused, an ex-Police Officer, was celebrating with his friends a Police win in a Rugby match. The celebrations had been on-going for some time and it is not in dispute that the accused was heavily intoxicated. He was aged 32 at the time. He had heard rumours that his biological sister, who was the victim in this case then aged 22, was involved in a lesbian relationship and he summonsed her to his home. He questioned her about this relationship and she denied it. He told her that he would "do something to her to make her forget she was a lesbian." She attempted to run away from him and ran onto the street outside. In the sight of neighbours and his drinking friends he chased her and caught her and put her in so much fear that she lost control of her bladder and bowels. He took her back into the house. His wife was there and she made the sister clean herself up after which the accused kept her in a locked bedroom over a period of three hours while he subjected her to sexual indignities and penile rape. His wife was at all times inside an adjacent room. The accused when giving evidence of the matter says that he was too drunk to remember the details but he did remember having sex with somebody but could not remember who with."

Ground 1 – Sentence was Lawful

[4] The Magistrate's order to make the 8 years term of imprisonment a suspended term to be served partially in the community with weekends in the prison was not a lawful

sentence. It was not permitted by virtue of section 26(2)(b) of the Sentencing and Penalties Act. That section reads:

> "26. (1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.
>
> (2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, -
>
> (a) does not exceed 3 years in the case of the High Court; or
> (b) does not exceed 2 years in the case of the Magistrate's Court."

[5] I believe the Petitioner understands that the sentence was unlawful in that where a head sentence is as high as 8 years imprisonment it is not a sentence permitted by law to be suspended. Ground 1 is to be rejected.

Ground 2 – Failure of High Court and Court of Appeal to consider section 18(2) – Harsh and Excessive

[6] The learned Resident Magistrate when considering sentence did not consider fixing a non-parole period [section 18 Sentencing and Penalties Act]. The section provides:

> "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."

[7] He could have considered the issue, and declined to impose such a period by reason of "the nature of the offence or the past history of the offender" [section 18(2)]. He simply did not go into this issue.

[8] Upon appeal the learned High Court judge imposed a non-parole period (on the modified Head Sentence of 17 years) of 15 years. There was no past history of offending or of offending in this grave category of offences – serious sexual misconduct, specifically rape. We can be sure therefore it was the nature of the offence and the unsavoury and horrific circumstances of this crime that caused him to see the need for fixing a lengthy non-parole period.

[9] The Court of Appeal, recognising that the High Court upon an appeal was confined to a sentence within the limited powers of the Magistrates Court came back down to the original Head Sentence of 8 years imprisonment.

[10] The Court of Appeal in **Livai Nawalu v. The State** Cr. App. CAV0012/2012 28th August 2013 at para [4] had explained as follows:

> "[24] [v] The appeal court must, if it substitutes its own sentence on appeal or by way of revision of the Magistrates Court's sentence, keep within the powers of the Magistrates Court. The High Court cannot substitute a Magistrates Court sentence with one which only the High Court can impose. The Magistrate is limited to a maximum term of imprisonment on each offence of 5 years [section 7 CPC] now 10 years [section 7(1)(a) CPD] and in total to 14 years where there are two or more distinct offences [section 12 CPC and section 7(2) CPD]. An exception would lie where legislation has specifically enhanced the power of the Magistrate to sentence beyond the usual limit."

[11] Had this been an original sentence in the High Court for rape of an adult, the term to be imposed would have been within the tariff of between 7-15 years imprisonment. This point was clear to both the High Court and the Court of Appeal. The learned Magistrate could have sent the case to the High Court for sentence. The circumstances of this crime were shocking and appalling. The offending should have been met with condign punishment and marked society's firm rebuke.

[12] The suggestion therefore that the eventual sentence, settled by the Court of Appeal, at 8 years head sentence with a 7 year non-parole period was "harsh and excessive" is to be strongly rejected.

Ground 3 – Penalty of fixing non-parole period not in force at time of sentence. Sentence in breach of sections 392, 393 Crimes Act

[13] A similar issue came up in the case of **Naitini v. The State** [2016] FJSC 6; CAV0034.2015; 21st April 2016. In referring to the Sentencing and Penalties Act Keith J at para 11 said:

> "... it had been enacted by 16 October 2010 which was the date on which Naitini was sentenced, and the judge was, on the face of it, entitled to fix a non-parole period because of one of the transitional provisions in the Sentencing and Penalties Decree. That is section 61(1) which provides:
>
> > "A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of this Decree if no sentence has been imposed on the offender prior to the commencement of this Decree"."

[14] Section 392(2) of the Crimes Act provides:

> "When imposing sentences for any offence under the Penal Code which was committed prior to the commencement of this Decree, the court shall apply the penalties prescribed for that offence by the Penal Code."

[15] However the nature of an order fixing a non-parole period has been categorised by this court as not amounting to "additional punishment" **Maya v. The State** [2015] FJSC 30. At para [27] it was said:

> "... the fixing of a non-parole period did not amount to additional punishment of the kind which section 3(2) of the Crimes Decree outlawed. It was the court's attempt to ensure that Maya would not be released from prison earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission."

[16] By way of elaboration of that reasoning Keith J said at para 17:

> "I do not think that the fixing of a non-parole period amounts to punishment. The punishment which Naitini got were the two head sentences. The fixing of the non-parole period did not increase those sentences. It only affected when he might be eligible for release by the operation of the current practice relating to remission prior to the expiry of the head sentences, but that did not make the fixing of the none-parole period punishment."

[17] The section 392 argument was also laid to rest in **Maya**. Keith J added at para 19:

> "I turn to Naitini's reliance on section 392(2) of the Crimes Decree. This was a case in which section 392(2) of the Crimes Decree required the court to apply "the penalties prescribed" for Naitini's offences by the Penal Code. Those penalties were the head sentences he received. Assuming that section 392(2) required the court to apply *only* "the penalties prescribed" by the Penal Code, the question is whether the fixing of a non-parole period amounted to a *penalty*. I do not think that it did – for the same reason that it did not amount to *punishment*. The non-parole period did not increase the head sentences. It only affected the date when Naitini might otherwise have been released by the operation of the current practice relating to remission."

[18] Fixing a non-parole period is not a novelty after the passing of section 18 of the Sentencing and Penalties Act. Formerly there was section 33 to consider under the repealed Penal Code.

[19] Keith J saw no real distinction. His lordship concluded the discussion this way [at para 22]:

> "Secondly, Naitini's arguments do not take into account the court's power in section 33 of the Penal code to fix the minimum period an offender had to serve. It is true that the court only had the *power* under section 33 to fix the minimum period for offenders who commit certain offences, whereas it was *obliged* under section 18 of the Sentencing and Penalties Decree to fix a non-parole period for offenders sentenced to imprisonment for life or for a term of two years or more. But that is a distinction without a difference for present purposes. The fact is that even if it could be said that the fixing of a non-parole period amounted to a punishment or a penalty additional to the head sentence, the power to fix a minimum period which the offender had to serve was available to the court both before the repeal of the Penal Code and afterwards." [emphasis added]

[20] That conclusion disposes of ground 3, and this Court must reject that ground.

[21] None of the grounds raise matters in which the criteria for leave to appeal are met. The petition must therefore be declined.

Marsoof J

[22] I have read the judgment of Gates P in draft and agree that for the reasons set out in the said judgment, leave to appeal has to be refused, the petition of the Petitioner has to be dismissed and the sentence substituted by the Court of Appeal must stand affirmed.

Aluwihare J

[23] I have read in draft the judgment of Gates P. I agree with the reasoning and with the orders.

Orders

[24] In the result the orders of the Court are:

(i) Leave to appeal is refused.
(ii) The petition is dismissed.
(iii) The sentence substituted by the Court of Appeal of 8 years imprisonment with a non-parole period of 7 years is affirmed.

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The Hon. Mr. Justice Anthony Gates
President of Supreme Court

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The Hon. Mr. Justice Saleem Marsoof
Judge of Supreme Court

.....
The Hon. Mr. Justice Buwaneka Aluwihare
Judge of Supreme Court

Solicitors:
Petitioner in person
Office of the Director of Public Prosecutions for State