IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0017 of 2017
(On Appeal from Court of Appeal No: AAU 095 of 2013)

BETWEEN : **IOWANE ISIKELI SENILOLOKULA**

Petitioner

AND : **THE STATE**

Respondent

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

Counsel : **Ms. S. Nasedra for Petitioner**
Ms. P. Madanavosa for Respondent

Date of Hearing: **13 April 2018**

Date of Judgment: **26 April 2018**

JUDGMENT

Gates P:

1. I agree with the judgment and reasoning of Keith J, and with the orders proposed.

Chandra J:

2. I agree with the reasoning and conclusion in the judgment of Keith J.

Keith J:

Introduction

3. Criminal offences vary considerably in their gravity. Day in and day out magistrates and judges are called upon to determine whether a particular offence has aggravating features which would justify an enhancement of the sentence, and whether it has mitigating features which would justify a reduction in the sentence. This case illustrates how great care should be taken when the judge is considering the extent to which the sentence should be enhanced to reflect any aggravating features of the offence.

4. The petitioner is Iowane Isikeli Senilolokula. I shall refer to him as the defendant from now on. He was charged with one count of rape, and tried in the High Court in Suva. He pleaded not guilty. He was convicted by the trial judge, Bandara J, after each of the three assessors had expressed the opinion that he was guilty. He was sentenced to 16 years' imprisonment with a non-parole period of 14 years.

5. The defendant filed a notice of appeal. It purported to be a notice of appeal against both his conviction and his sentence. However, the grounds of appeal within the notice contained only grounds of appeal against conviction, and only one ground at that. When the notice of appeal came before the single judge, Goundar JA, he refused the defendant leave to appeal against his conviction. However, he was troubled by three aspects of the trial judge's approach to sentence, and he gave the defendant leave to appeal against sentence. The Court of Appeal (Gamalath JA, Prematilaka JA and Temo JA) agreed with one of Goundar JA's misgivings, and allowed the appeal, reducing the sentence to one of 12 years' imprisonment with a non-parole period of 11 years. The defendant contends that this reduction was insufficient, and he now applies to the Supreme Court for special leave to appeal against his sentence in order to get his sentence reduced further.

The facts

6. The defendant and his wife were the wardens of a hostel for deaf children. It was a Christian establishment, and in addition to his duties as warden, the defendant gave the children biblical classes. There were about 12 girls living at the hostel at the relevant time. They called him "Daddy". The complainant was one of the girls living at the hostel. She was 16 years old throughout the period during which she was abused. She was deaf and had a speech impediment.

7. Over a period of three months between April and June 2011, the defendant persuaded the complainant to have sexual intercourse with him six times. He relied on her naivety. He told her that he would teach her how to have sex so that she would be experienced in sexual matters when it came to satisfying her future husband. On the first occasion when it happened, the defendant went to the girl's room in the early hours of the morning. He told her not to be afraid as he was her "daddy" and she was his daughter. He had to pull her thighs apart, but she eventually submitted to his demands because she was scared of what would happen to her if she did not. She experienced a considerable degree of pain. The same thing happened on other occasions, once in her bedroom again, once in the defendant's bedroom when his wife (who was deaf herself) was asleep, once in his daughter's bedroom, once in the living room and once in the defendant's toilet.

8. The complainant did not tell anyone about the abuse of her at the time. It only came to light in 2012 when she told another teacher at the school about it. At his trial, the defendant did not deny having had sexual intercourse with the girl. His defence was that she had at all times consented to sexual intercourse with him. All he had been guilty of, he claimed, was adultery. By finding him guilty, the judge must be taken to have concluded that her submission to sexual intercourse had not amounted to her consent to it, and that she only submitted to it because she feared what might happen to her if she did not.

9. Finally, although there were six occasions when sexual intercourse took place, the charge which the defendant faced was a single charge of rape which was alleged to have taken place between 1 April and 30 June 2011. However, the prosecution's case, as the judge pointed out to the assessors, was that this was a representative count. Indeed, that was what the amended information had said, and therefore it was not something which would have taken the defence by surprise. What impact that should have had on the sentencing process is something to which I shall have to return.

The trial judge's reasoning

10. The trial judge took 8 years' imprisonment as his starting point. He said that this was at the lower end of the appropriate range, but he decided to reflect the aggravating features as he saw them by enhancing the sentence in various stages. The judge regarded the fact that the defendant had been in a position of authority over the girl – a position which he had gravely abused – as a significant aggravating factor. He enhanced the starting point by three years for that reason. Next the judge thought that the deception which the defendant had practiced on the girl – by telling her that he was simply preparing her for marriage – was a serious breach of trust, which warranted an enhancement of the sentence by a further three years. Thirdly, the judge treated the defendant as opportunistic in the sense that he took advantage of her naivety, her disability and her unsophisticated rural background. For that he increased the starting point by another two years. Fourthly, the judge regarded as significant the fact that considerable planning must have gone into all this. For the fact that the defendant had at no time acted on the spur of the moment but had planned each occasion on which he had subjected the girl to his sexual demands, the judge enhanced the sentence by another year. Fifthly, the judge noted that the abuse had gone on for what he described as a "period of time" and involved "repeated … sexual acts". That justified adding a further year to the starting point. Finally, the judge noted the defendant's complete lack of remorse. The girl had been required to relive her ordeal by giving evidence, and the only guilt the defendant was prepared to accept was that he had been unfaithful to his wife. For that, the judge added a further year. All of this came to 19 years.

11. The only mitigation which the judge identified was that the defendant was a first offender with no previous convictions. He reduced the sentence which he would otherwise have passed by three years for that reason. Since the defendant had been on bail and had pleaded not guilty, there was no reason to reduce the sentence further. Accordingly, the judge sentenced him to 16 years' imprisonment with a non-parole period of 14 years.

The approach of the Court of Appeal

12. The Court of Appeal thought that the trial judge had made an arithmetical error. It thought that the starting point of 8 years plus the various years which the judge had added for the aggravating features of the case came to 18, not 19, years. That was what had been submitted to it by the prosecution. Both the prosecution and the Court of Appeal were wrong. They had omitted in their calculation the one year which the trial judge had added for the length of time the abuse had gone on for. The Court of Appeal's criticism of the trial judge in this respect was therefore misplaced.

13. The Court of Appeal's other criticism of the trial judge reflected one of Goundar JA's three concerns about the sentence passed on the defendant. That was that there had been a significant element of double-counting in his approach: he had, to use the words of Gamalath JA, "counted some of the aggravating features twice over". Specifically, the Court of Appeal regarded the defendant's abuse of authority and his breach of trust as overlapping. The two elements were so interconnected that they should have been treated as different sides of the same coin. Since each of those elements had resulted in the starting point being enhanced by three years (making six years in all), the remedy for that was to reduce the sentence by three years. If the trial judge had not made the arithmetical error which the Court of Appeal wrongly thought he had made, he would have passed a sentence of 15 years' imprisonment. That was why the Court of Appeal substituted a sentence of 12 years' imprisonment (with a non-parole period of 11 years) for the sentence passed by the trial judge.

The grounds for leave to appeal

14. Only one ground is relied on by the defendant's counsel in support of this application for special leave to appeal. That is that the trial judge "erred in failing to consider the [defendant's] family circumstance[s] and the likely effect the sentence will have on [his] family". This contention is factually incorrect. The trial judge *did* consider the defendant's family circumstances. In his sentencing remarks, he referred to the defendant's three children and their ages, and he expressly acknowledged that if the defendant was to be sentenced to a term of imprisonment, the family would have no income and the effect of that on his family would be disastrous. If the point being made is that the judge did not treat that as mitigation, that would be correct. The judge expressly said that the only mitigation defendant had was his clean record.

15. This ground of appeal is new. It was not raised in the Court of Appeal. Indeed, not only is it now being raised for the first time; it was sprung on the prosecution and the court at the last moment. It first saw the light of day two days before the hearing in the Supreme Court when written submissions prepared on behalf of the defendant were filed. The defendant's counsel, Miss S Nasedra, told us of the difficulty in getting instructions from the defendant. We did not explore with her what those difficulties were, but it is hardly satisfactory for the only ground of appeal to emerge in this way and so close to the date of the hearing.

16. As it is, I do not think that it can afford the defendant an arguable ground of appeal. The defendant was looking at a very long sentence come what may. Family circumstances may have an important part to play when the court is considering whether to pass a short custodial sentence or whether a non-custodial sentence might be justified. Strong mitigation about the effect of a sentence of imprisonment on the offender's family will then be very important, and could make all the difference between a custodial sentence and a non-custodial one. Family circumstances will have less part to play in a case such as the present where the offender is going to be parted from his family for a long time in

any event. When one looks at the case as a whole, the three years which the judge allowed for such mitigation as was available to the defendant was not too short.

The trial judge's approach to the sentencing process

17. There are two features about the trial judge's approach to the sentencing process which need to be addressed. Both raise fundamental questions about how a judge should approach the difficult task of sentencing an offender. The first relates to how a judge should choose his starting point for sentence. As I have said, the trial judge took 8 years' imprisonment as his starting point, ending up with 19 years when the aggravating features had been taken into account. He did not explain why he took 8 years as his starting point. It was a surprising starting point to take as the judge himself said that the appropriate range of sentence for the offence of rape was 10-15 years' imprisonment. Indeed, the gap between his starting point and where he ended up before considering the defendant's personal mitigation is so large that it rather suggests that something has gone wrong somewhere. That difference would have been less stark if the judge had taken as his starting point somewhere within the appropriate range.

18. But where within that range should the starting point have been? There is no problem when there is established authority for what the starting point should be. For example, in the past the starting point for the offence of rape was 7 years' imprisonment. The problem arises when there is no established authority for the starting point, but instead an appropriate range of sentence (sometimes referred to as the tariff) has been identified. For example, the appropriate range of sentence for the rape of a child (ie someone under the age of 18) is 10-16 years' imprisonment: see **Anand Abhay Raj v The State** [2014] FJSC 12 at [58]. Where within that range should the starting point be?

19. There is here a difference in judicial opinion. In **Koroivuki v The State** [2013] FJCA 15, Goundar JA said at [26]: "As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff." On the other hand, a number of trial judges choose the lower end of the range as a matter of routine. For example, in **Jemesa**

Gaunavinaka v The State [2017] FJHC 425, Perera J said at [24] that "the starting point of a particular offence should be construed as the minimum period of imprisonment a particular offence should attract".

20. This difference of approach has to be resolved at some stage, but this is not the time to do so. The issue was understandably not raised by the defence: they were content with the fact that the judge had taken as his starting point, not just a term at the lower end of the range, but well below even that. Nor was it raised by the prosecution, no doubt because they were content to address the only ground of appeal relied on by the defence. The issue is one which requires careful and mature consideration, with the benefit of help from counsel, and neither of them were in a position to address the issue when it was tentatively raised by the court. I simply highlight it now to show that it needs to be engaged at some stage.

21. The second feature about the judge's approach to the sentencing process which needs to be addressed is whether it is appropriate for the amount by which an offender's sentence is to be increased for each of the aggravating factors should be identified. The judge in this case enhanced the sentence in six separate stages, identifying the size of the increase at each stage: (i) three years for the abuse of authority; (ii) three years for the breach of trust; (iii) two years for the opportunistic nature of the abuse; (iv) one year for the planning; (v) one year for the length of time the abuse lasted; and (vi) one year for the defendant's lack of remorse. This is too mechanistic an approach. Sentencing is an art, not a science, and doing it in the way the judge did risks losing sight of the wood for the trees.

22. The danger is twofold. The first is that you ignore the bigger picture. It would have been less objectionable if the judge had then stood back and asked himself whether 19 years' imprisonment was the appropriate sentence subject to the defendant's personal mitigation, but he did not do that. The risk of passing too heavy a sentence would have been lessened had the judge stood back and asked himself whether the sentence he had in mind subject to personal mitigation fitted the crime. I shall return to that later on. The

second danger in the judge's approach is that you run the risk of sentencing the offender twice over for the same thing. That is what happened here. There was a strong element of double counting, the most obvious example of that being the one which the Court of Appeal identified. Another is that opportunistically taking advantage of the girl's vulnerability was merely an aspect of the defendant's abuse of authority and his breach of trust. The danger of double counting would have been less if the judge had not assigned particular periods of imprisonment to each of the aggravating factors.

Lack of remorse

23. One of Goundar JA's other concerns was the one year by which the trial judge had enhanced the defendant's sentence for his lack of remorse. The Court of Appeal did not address that. We do not know why. It addressed Goundar JA's concern about the possibility of double-counting even though there had been no application for leave to appeal against sentence. As it is, lack of remorse is not an aggravating factor. Not being sorry about what you have done does not make what you have done any the worse. It just means that you forfeit whatever chances you may have had for a more lenient sentence. The trial judge should therefore not have enhanced the defendant's sentence for the defendant's lack of remorse.

A single offence?

24. I have already referred to the fact that the defendant faced a single count of rape, alleged to have been committed between the beginning of April and the end of June 2011. But since it was a representative count, relating to a course of conduct in which he raped the complainant six times during that period, the question arises as to how that affects the sentencing process. The judge sentenced the defendant on the basis that he had raped the complainant a number of times. Was he entitled to do that, or should he have sentenced the defendant on the basis that he had been convicted on one count of rape only? That was the third of Goundar JA's misgivings about the judge's approach, but unfortunately the Court of Appeal did not address it.

25. The law on the topic is clear. Where an offender is convicted on a single count, he may not be sentenced on the basis that he was guilty of other offences of a similar nature unless he has admitted that he was guilty. A court is not permitted to base its decision about the appropriate sentence on the commission of offences which did not form part of the offence for which the defendant was convicted. Indeed, the fact that the count on which the defendant was convicted was described by the prosecution as a representative count did not entitle the judge to sentence him as if he had been found guilty of other offences not included in the indictment. That is the effect of a series of decisions in England: **R v Burfoot** (1990) 12 Cr App R (S) 252, **R v Clark** [1996] 2 Cr App R (S) 351 and **R v Canavan** [1998] 1 Cr App R (S) 79.

26. The upshot is that if the prosecution wants an offender to be sentenced for the whole of his offending, there have to be separate counts in the information for each of the offences. It has been said that where the offender is alleged to have committed multiple crimes of the same type against the same victim, it would be awkward to have a number of separate counts in the information all in the same terms. That is not a problem. Take this case as an example. The particulars of the offence in the only count which the defendant faced were (leaving out those details which might result in the complainant being identified):

> "Iowane Isikeli Senilolokula between 1 April 2011 and 30 June 2011 at xxx had carnal Knowledge of xxx without her consent."

The next count could then have read:

> "Iowane Isikeli Senilolokula on an occasion other than that referred to in count 1 between 1 April 2011 and 30 June 2011 at xxx had carnal knowledge of xxx without her consent."

The remaining counts could then have been drafted in the same way.

The appropriate sentence

27. In the circumstances, it is necessary for us to consider whether a different sentence should be passed in place of the sentence which the Court of Appeal substituted for that of the trial judge. Without deciding as a matter of principle where that starting point should be in a case where there is an appropriate range of sentence, we proceed in this case on the basis that the starting point here should be at the lower end of the appropriate range, namely 10 years' imprisonment. It should not be forgotten that even that is a substantial sentence, and reflects many of the features which make the rape of a child particularly serious.

28. Having said that, though, this was a serious offence of its kind. The defendant was 35 years old at the time. He persuaded a naïve and vulnerable girl of 16 to have sexual intercourse with him by a dishonest subterfuge, knowing that she was unhappy about what he was doing to her, causing her considerable pain, taking advantage of her trust in him and grotesquely abusing his authority. He has to be treated for the purpose of sentence as having done that just the once, but whereas the loss of her virginity should have been an occasion which she would remember with love or at least affection, she has been robbed of one of the great joys of life. On the other hand, although the defendant achieved his end by deception, no violence was used, and although there was no question of the complainant having consented to sexual intercourse, this was a case of her submitting to sexual intercourse rather than being forced by the use or threat of violence to engage in it. In my opinion, when you take the aggravating and mitigating features of the defendant's conduct into account, the starting point should be enhanced by three years.

29. The only factor relating to the defendant which could amount to mitigation is that he was a first time offender, but that cannot be significant mitigation in this case since it was because he was a man of good character that he was entrusted with the responsible position of warden of a hostel for deaf children. I would discount his sentence by one year to reflect that fact. Accordingly, although I disagree with the route by which the

Court of Appeal arrived at what it thought was the appropriate sentence, I agree with the outcome which the Court of Appeal proposed, including the non-parole period of 11 years.

30. I should add just one thing to that. It is always useful for the judge to stand back at the end of the process to see whether the sentence he proposes to pass feels right. Judges tend to develop a strong sense of what the appropriate sentence should be. Asking themselves at the end of the process whether the sentence they propose to pass feels right is a sensible way for the judge to check whether the decision which he has reached by a more analytical process is likely to be correct. Had the trial judge done that, it may be that he would not have passed a sentence which was as long as the one he ended up passing.

Conclusion

31. This case has involved substantial questions of principle affecting the administration of criminal justice, namely the proper approach to be adopted when selecting the starting point for sentence for an offence for which an appropriate range of sentence has been identified, and when an offence has a number of aggravating features. I would therefore grant the defendant special leave to appeal against his sentence. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for special leave to appeal as the hearing of the appeal, but for the reasons I have endeavoured to give, I would dismiss the appeal.

Orders:

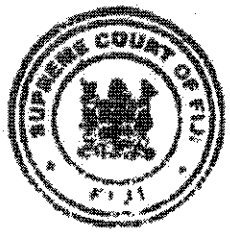
(1) Application for special leave to appeal against sentence granted.

(2) Appeal against sentence dismissed.

(3) Sentence of 12 years' imprisonment with a non-parole period of 11 years affirmed.

.....

Hon. Chief Justice Anthony Gates
PRESIDENT OF THE SUPREME COURT



.....

Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT

.....

Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT