IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0021/2017
[On Appeal from Court of Appeal No. AAU 0017/2012]

BETWEEN : **SAILOSI SELEBULA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Ms. S. Nasedra for Petitioner**
Mr. S. Vodokisolomone for Respondent

Date of Hearing: **16 April 2018**

Date of Judgment: **26 April 2018**

JUDGMENT

Chandra J:

1. I agree with the reasons and conclusions reached by Chitrasiri J in his judgment.

Keith J:

2. I agree with the orders proposed by Chitrasiri J for the reasons given by him in his judgment.

Chitrasiri J:

Introduction

3. The Petitioner was charged with one count of rape and two counts of indecent assault on an 8-year-old girl who is the daughter,born to his wife from her previous marriage. Before the trial commenced, the Petitioner pleaded guilty to two counts of indecent assault inflicted on the same victim. He was found guilty after trial, for the charge of rape and was convicted and sentenced to a term of 14 years imprisonment with a non-parole period of 11 years.

4. Being aggrieved by the said decision of the High Court Judge, the Petitioner filed anapplication for leave to appeal in the Court of Appeal against the conviction, but nothing was filed challenging the sentence. The appeal came up before a single Judge of Appeal and itwas dismissed on the 08th April 2014in terms of section 35 (2) of the Court of Appeal Act stating that there were no arguable grounds to proceed with the petition of appeal.In that decision, the learned Judge has found that the appeal cannot possibly succeed on those groundsmentioned in the petition of appeal.

5. After a lapse of about 3 years and 8 months, the Petitioner filed a Notice of Appeal on the 5th December 2017 in the Supreme Courtseeking to have the decision of the Court of Appeal reversed.

6. Even though the Petition of Appeal consist of 12 grounds of appeal, in the submissions filed on his behalf, the petitioner has decided to restrict his appeal only to the grounds 8, 9 and 10 mentioned therein. In that Notice of Appeal, the Petitioner also has raised seven grounds of appeal against the sentenceimposed on him. As mentioned before, it is important to note that no appeal was filed against the sentence when he challenged the High Court decision in the Court of Appeal. Hence, those grounds against the sentence have been raised by the petitioner for the first time in the Supreme Courtandwere neverargued in the Court of Appeal.

7. The aforesaid grounds of appeal are reproduced herein below:

GROUNDS OF APPEAL AGAINST CONVICTION

8. *That the learned trial Judge erred in law and in fact when he failed to direct the assessors to determine whether they considered the caution statement to be true and reliable in whole or in part and consider its contents with all the other evidence the Appellant mention in the trial which open to be heard by the assessors, the state/s counsel, the Judge and again the police officers who had interviewed him (Burns vs- R (1975) 132 CLR 25.*

9. *That the learned trial Judge erred in law and in fact when he failed to refer to such caution statement and direct the assessors that it must be satisfied that he said statement proves the relevant element beyond reasonable doubt.*

10. *That the learned trial Judge erred in law and in fact when he failed to commenting to the assessors that such caution statement is the only evidence, or the most significant evidence in proof of the element and can only satisfied of the element beyond reasonable doubt it they are satisfied of the caution statement.*

GROUNDS OF APPEAL AGAINST SENTENCE

13. *That the learned trial Judge erred in law and in fact when he failed to deduct the accused's remand period when sentencing the accused to 14 years imprisonment.*

14. *That the learned trial Judge erred in law and in fact when he failed to give a proper sentencing imprisonment term to the accused who was a first offender.*

15. *That the learned trial Judge erred in law and in fact when he failed to give a proper discount on the accused mitigation and as such denied the accused who was unpresented and lack of the knowledge of the law and that when the Department of the Legal Aid withdrew from representing the accused.*

16. *That the Appellant appeals against sentence being manifestly harsh and excessing and wrong in principal in all the circumstances of the case.*

17. *That the learned trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into relevant consideration.*

18. *That the learned trial Judge erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009 when sentencing the Appellant.*

19. *That the learned trial Judge erred in law and in fact in the Sentencing when he imposed the non-parole period too closed to the head sentence as such denying and discouraging the rehabilitation (Please view case authority of TORA v STATE)*

Appeal against the conviction

8. The aforesaid 3 grounds of appeal against the conviction are directed towards the manner in which the cautionary statement of the petitioner was dealt with by the trial judge when he directed the assessors. The learned counsel for the petitioner quoting from the trial Judge's directions to the assessors has stated that there were no proper directions regarding the cautionary statement to assess the evidence for the assessors to get at the truth. He also has stated that the trial Judge in his summing up has simply stated that it is a matter

ultimately up to the assessors and has insisted upon the assessors that it is their responsibility to consider the explanation offered by the petitioner. Accordingly, he submits that there were no proper directions from the trial Judge, directing the assessors to ascertain the truth.

9. In support of his argument, learned counsel for the petitioner in his submissions has referred to the following decisions:

Vakacereivalu v State [2015] AAU 116 of 2011

Noa Maya v The State No. CAV 009 of 2005

Chan Wei Keung v The Queen [1967] 2AC 160

Colati v State CAV 0026 of 2016

10. Having cited those authorities, the learned counsel in his submissions has quoted paragraphs 15, 16 and 24 in the summing up andhas argued that there were no clear directions to the assessors regardingthe weight that should be given to the caution interview statement of the petitioner. He, hasfurthersubmitted that without having clear direction to the assessors, the verdict that was returned would amount to miscarriage of justice. Contents of thoseparagraphs in the summing up read as follows:

> *"...The Accused does not dispute that he gave the answers recorded but he says that they are not true and he only gave those answers because he was told to. You will have to consider that explanation."*
>
> *"He accepts that he told the police that he had penetrated Mafi's vagina; he explains that by saying that the police told him to follow what had had said and to agree with it and the rest was for him to explain to the Judge. He said that his admissions to the police are not true, but what he said after he has been charged is the truth. He said that one of the police officers spoke to him alone and when that police officer read out the*

caution interview he told the police officer that some of the things written in it were not correct but he was told by the officer that he had to follow what was written."

11, In his directions to the assessors, learned trial Judge has stated that it is a matter which ultimately falls on them and thattheyare to consider the explanation offered by the petitioner. Therefore,it is seen that the trial Judge has directed the assessors to consider carefully the explanation offered by the petitioner though he has failed to itemize separately, the important areas in the cautionary statement. In paragraph 16 of the summing up he has stated as follows:

"Following the discussion with the accused it was apparent that his case was that the interviewing officer told him to agree with the account given by Mafi and that is what he did although the account that he was giving was not true. The accused does not dispute that he gave the answers recorded but he says that they are not true and he only gave those answers because he was told to. ***You will have to consider that explanation".***

12. It is not incorrect to say that merelydirecting the assessors to consider the explanation given by an accused person to the police without explaining the facts and circumstances connected therewith,is not a proper direction. Trial judge must explain to the assessors all the facts and circumstances that led to make the cautionary statement.He also mustexplain the contents of the cautionary statement in simple language enabling the assessors to arrive at the correct verdict.

13. However, at this stageit is important to note that there is ample evidence to confirm what the petitioner had said in his caution interview. Admission by the petitioner in his caution interview statement of raping the victim is clearly consistent with the medical evidence of the doctor who examined her. This position is further confirmed by the evidence of the complainant Mafi as well. Under such a backdrop only, the assessors were to consider the weight that is to be given to the caution interview statement.

14. In this regard, the Supreme Court in **Lepani Varani v State** [2016 FJSC 36: CAV 0013.2016 had held thus:

> *"The Court of Appeal according to the above passages dealt with the argument regarding the absence of a direction by the trial Judge regarding the weight and truth of the confession comprehensively. The Court was of the view that there was sufficient evidence of the trial which gave weight to the truth of the confession once the voluntariness was accepted by the Assessors."*

15. In this instance,the position taken up by the petitioner is that even though he admitted committing the offence in his caution interview statement, those admissions were not true. However, the fact remains that the assessors were to consider such a position along with the evidence given by theother witnesses as well. Therefore,when looking at the totality of the evidence recorded in this case, it is my opinion that no miscarriage of justice had been caused even though there had been a few infirmities in the directions given to the assessors by the learned trial Judge. Accordingly, I am inclined to answer the questions of law raised against the conviction in favour of the State.

Appeal against the Sentence

16. Grounds upon which the sentence was appealed against has already been mentioned hereinbefore. There are 7 grounds, thatthe petitioner has mentioned. However, the Counsel for the petitioner in his oral and written submissions restricted the appeal against the sentence only to the first ground namely, the failure of the judges in the lower courts to look at the period of remand that the petitioner had been in, before the sentence was passed on him. Of course, no appeal was argued challenging the sentence in the Court of Appeal for the Judge to consider. I will be dealing with this issue of not raising in the Court of Appeal any ground of appeal against the sentence, later in this judgment.

17. The record maintained in the Magistrates' Court show that the order to remand the petitioner had been first made on the 4th of August 2010 (page 209 of the High Court Record). He was sentenced to imprisonment on 10thDecember 2010 by the learned High

Court judge sitting at Suva High Court (page 16a of the High Court Record). There is no record to show that he was released on bail within the period in between. Therefore, it is clear that the petitioner had been on remand for 4 months and 6 days prior to being sentenced.

18. I have carefully looked at the sentence passed on the petitioner. I am unable to find any consideration of the period of remand that the petitioner has served, in the sentence passed by the High Court Judge. Learned counsel for the State argued that the learned trial judge had considered the period of remand when the petitioner was sentenced referring particularly to the last paragraph of the sentence and it reads thus:

> *"For the offence of rape of an 8-year-old girl, I must pass a sentence upon you that properly reflects the complete abhorrence that members of the public feel towards adults who abuse young children in their care. In my judgment, for such an offence, even following a plea of guilty, a sentence in the region of 10 years would be appropriate. You have denied yourself the mitigation of a guilty plea and* ***the only mitigation available to you is the fact of your previous good character.*** *I have summarized the aspects of the offence that increase the seriousness of it and I pass upon you consequence a sentence of 15 years reduced to 14 years by your good character; the non-parole period will be 11 years."(emphasis added)*

19. This paragraph shows that it is only the previous character of the petitioner that had been considered as a mitigatory factor when passing the sentence. He has never made any reference to Section 24 of the Sentencing and Penalties Act 2009 in whichthe requirement to consider the period of remand served by an offender at the time of sentencing is clearly mentioned. The said section stipulates as follows:

> *"24. 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 by the court as a period of imprisonment already served by the offender."

20. No consideration,as referred to in the aforesaid provision of the law,has been made by the learned High Court Judge. Even in the last paragraph in the sentence, it does not indicate that the trial judge has independently considered the period of remand that the petitioner had undergone. Therefore, it is clear that the learned trial judge has misdirected himself as to the contents in Section 24 of the Sentencing and Penalties Act 2009.

21. Now the question arises whether such an error could be rectified by the Supreme Court when no appeal had been filed in the Court of Appeal challenging the sentence imposed on the petitioner. Section 14 of the Supreme Court Act 1998 stipulates that the Supreme Court is vested with all the power and authority of the Court of Appeal in relation to matters that come before it, and that power and authority may be exercised, with such modifications as are necessary according to the circumstances of the case. Furthermore, Section 7 (1) (c) of the said Act of 1998 empowers the Supreme Court to grant special leave and to make such other orders as the circumstances of the case require.Also,in sub section (2) (c) of the same Section 7of the Supreme Court Act gives the power to the Supreme Court to grant special leave to appeal in order to prevent substantial and grave injustice being caused to an appellant. Therefore, particularly in order to ascertain whether there had been any injustice being caused to the petitioner, I am inclined to consider the merits of the appeal filed against the sentence despite the fact that there had been no appeal filed canvassing the sentence imposed on the petitioner.

22. This finding is supported by the decision in **Eroni Vaqewa v The State** [2016] FJSC 12; CAV 0016 of 2015. In that decision Supreme Court having recognised the power to entertain fresh grounds of appeal which were not taken up in a court below has mentioned that such power will not be exercised unless its significance upon the special leave criteria was compelling. This same criterion had been followed in the case of **Anthony v State** Criminal Petition CAV 028 of 2016 as well. Indeed, in **Pauliasi Nacagilevu v The State;** CAV 0023 of 2015,it was stated that, in fairness to the petitioner we decide to consider this

ground (which was not argued in the court below) briefly to examine whether there is any merit in this ground of appeal.

I believe the reasons referred to in paragraph 17of this judgment referred to above would justify this court looking at the fresh ground urged by the appellant i.e. not considering the period of remand, the petitioner had served at the time the sentence was passed.

23. Failure to consider the period of remand served by the petitioner in this instance is a serious errorsince it amounts to noncompliance of Section 24 of the Sentencing and Penalties Act. Therefore, if such an error is not rectified even at this stage, it would lead to miscarriage of justice. Accordingly, in order to see the ends of justice, I would think this Court should intervene and remedy the situation.

24. Next issue that arises is whether it is correct to entertain this appeal despite the delay in filing the same. In terms of Rule 5 made under the Supreme Court Act 1998, a party aggrieved by a decision of the Court of Appeal shall lodge an appeal, supported by a petition and affidavit in the Court Registry, within 42 days of the date of the decision from which leave to appeal is sought. In this instance, the decision of the Court of Appeal had been made on the 8th April 2014. The notice of appeal had been received by the Registry on 17 December 2017. Accordingly, there was a delay of about 3 years and 8 months when filing this appeal. Then the question arises whether or not this Court should consider the merits of this appeal despite the said delay when filing this appeal.

25. In the case of **Kumar v State and Sinu v State**, [2012] FJSC17CAV 001 of 2009 21st August 2012,Supreme Court has stated as follows:

> *"We therefore have no difficulty in holding that this Court is indeed possessed of jurisdiction to grant enlargement of time in appropriate cases for the late lodgment of application for special leave to appeal".*

Also, in the case of **Rasaku and Momoivalu v The State** [2013] FJSC 4; CAV 0009 of 2013, it was held that:

> *"We therefore have no difficulty in holding that this Court is indeed possessed of jurisdiction to grant enlargement of time in appropriate cases for the late lodgment of application for special leave to appeal."*

26. According to counsel for the petitioner, the delay in filing the appeal was that the petitioner had beendetained at a distant prison in Levuka which has no facility to prepare the necessary papers to lodge an appeal. According to him, the petitioner had been an inmate for about 1 year in the prison at Levuka and then he was taken to the prison in Korovou. After he was brought to Korovou prison only, he was able to prepare the appeal papers. Moreover, the failure to consider the period that the petitioner was to serve in remand amounts to an error. Therefore, to my mind this is a fit case for the Supreme Court to intervene disregarding the delay in filing the appeal.

27. In the circumstances, I find that the requirement referred to in Section 7(2) of the Supreme Court Act in order to grant leave to appeal exists in this appeal filed against the sentence. Therefore, upon considering the failure to deduct the period that the petitioner was in remand when the sentence was passed on him, I am inclined to grant leave to proceed with the appeal filed against the sentence. Accordingly, I make order that the period of imprisonment imposed on the petitioner should be reduced by 4 months which period, the petitioner was in remand custody.

Orders of the Court

1. Leave to appeal against the conviction is refused.
2. Leave to appeal against the sentence is granted.
3. Sentence of imprisonment imposed on the petitioner is to be reduced by four (4) months.

4. Accordingly, the sentence imposed on the accused/petitioner shall read as 13 years and 08 months imprisonment and the non-parole period to remain as 11 years.

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Hon. Mr. Justice Suresh Chandra

Judge of the Supreme Court

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Hon. Mr. Justice Brian Keith

Judge of the Supreme Court

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Hon. Mr. Justice Kankani Chitrasiri

Judge of the Supreme Court