IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Criminal Petition No. CAV 0011 of 2020
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0097 of 2014; High Court No. HAC 78 of 2013]

BETWEEN : **SAMISONI RABAKA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court

Counsel : **Petitioner in person**
: **Ms. U. Tamanikaiyaroi for the Respondent**

Date of Hearing : **04 April 2023**

Date of Judgment : **27 April 2023**

JUDGMENT

Gates, J:

[1] I agree with Lokur J's judgment, its reasons and final orders.

Keith, J:

[2] I have read a draft of the judgment of Lokur J. I agree with it, and with the orders he proposes.

Lokur, J:

Prologue

[3] Nelson Mandela had this to say of children:

> *'Our children are our greatest treasure. They are our future. Those who abuse them tear at the fabric of our society and weaken our nation.'*

Child sexual abuse (CSA) is perhaps the worst crime that can be inflicted on an innocent and therefore society and our courts must deal with it with firmly. Every case concerning a child, particularly a victim of CSA, must be handled with a high degree of sensitivity at every level and in the best interest of the child.

Background facts

[4] The Petitioner was charged with one count of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009. The particulars of the offence are that the Petitioner on the 5th day of February 2013, at Veikoba, in Valelevu in the Central Division, penetrated the vagina of XXX, a child under the age of 13 years, with his finger. In fact, the child was then aged 3 years and about 4 years during the trial.

[5] It may be noted that the Petitioner was living with a family being a couple and their son and daughter XXX. Consider how he abused their hospitality and trust.

[6] The Petitioner pleaded not guilty to CSA. A trial was held and the three assessors gave a unanimous opinion that the Petitioner was guilty of the offence charged. By a judgment dated 18 July 2014, the High Court at Suva in *Criminal Case No. HAC 78 of 2013* agreed with the assessors and found the Petitioner guilty and convicted him of the offence.

[7] The learned Trial Judge then heard the Petitioner on the quantum of sentence and by an order dated 25 July 2014 directed the Petitioner to serve a sentence of 16 years for the crime and to serve 15 years of the sentence before being eligible for parole.

[8] The Petitioner preferred an appeal to the Court of Appeal against the conviction as well as the sentence, being *Criminal Appeal No. AAU 97/2014*. A learned Single Judge heard learned counsel for the parties on 28 April 2016 and in his Ruling delivered on 5 May 2016 refused leave to appeal against conviction. However, the learned judge granted leave to appeal against the sentence only on one ground, relating to an aggravating factor. The ground urged was:

> *"The learned trial Judge caused the sentence to be harsh and excessive by treating as an aggravating factor:*
>
> > *.... that he would put a four year old, vulnerable witness, through the ordeal of giving evidence to the Court."*

[9] When the appeal came up for consideration before the Full Court on 2 July 2018, learned counsel for the Petitioner specifically informed the Full Court that the Petitioner does not seek to renew the application for leave to appeal against conviction. In paragraph [4] of its judgment dated 10 August 2018, the Full Court noted:

> *"At the commencement of the appeal hearing Counsel for the appellant informed the Court that the appellant does not seek to renew his application for leave to appeal against conviction and will pursue the one ground of appeal against sentence for which leave had been granted."*

[10] It is, therefore, clear that the Petitioner did not invite a decision on merits of the conviction from the Court. However, the Petitioner did contest the sentence awarded on the sole ground mentioned in the Ruling.

[11] With regard to the sentence awarded to the Petitioner, the Court observed, in its judgment and order dated 10 August 2018 as follows:

> *"For this particular factor the learned judge added a further 2 years to his starting point sentence of 14 years. It was conceded by the respondent that the right to a fair trial is a constitutional right which implies a right to plead not guilty and a right to compel the prosecution (i.e. the State) to prove its case beyond reasonable doubt. A convicted person cannot be punished to (sic) [for] exercising a constitutional right to be tried for the offence for which he has been charged."*

[12] The Court then went on to hold that the *"sentencing discretion has miscarried."* Following this conclusion, the Court held:

> *"When the sentencing decision is read as a whole it is my opinion that a different sentence should have been passed. As a result I would quash the sentence passed by the trial Judge and I would substitute a sentence of 13 years imprisonment with a non-parole term of 11 years."*

[13] On 17 April 2020, the Petitioner filed a "Notice to file additional grounds of appeal" in this Court. The "additional grounds" contained in the Notice are the same grounds that the Petitioner had taken before the Court of Appeal on the merits of the conviction. It may be recalled that these grounds were earlier considered and rejected by the learned Single Judge of the Court of Appeal in the Ruling delivered on 5 May 2016 and, importantly, not canvassed before the Court of Appeal, as noted in paragraph [4] of the judgment and order dated 10 August 2018.

[14] Under these circumstances, the preliminary question that arises for consideration is whether this Court should at all entertain the *"Notice to file additional grounds of appeal"*.

<u>Discussion</u>

[15] It is quite clear from the events that transpired before the Full Court that the Petitioner and his learned counsel were aware that the learned Single Judge, in the Ruling delivered on 5 May 2016, refused leave to appeal against conviction. The Petitioner had an opportunity before the Full Court to renew his appeal against conviction, but chose not to do so.

[16] As mentioned above, in this Court, the Petitioner has filed a *"Notice to file additional grounds of appeal"* on 17 April 2020. I have gone through the *'Notice'* and find that the grounds urged are the same as those before the Court of Appeal. This being the position, the Petitioner is apparently attempting to leapfrog the Court of Appeal. He did not invite a decision on the grounds before the Full Court, instead seeks to press them through a *'Notice'* filed in this Court. The Petitioner clearly cannot be permitted

to do so. He had the opportunity to canvas all grounds against his conviction, but voluntarily chose not to do so.

[17] As regards the sentence awarded, the submission of the Petitioner before this Court is simply that it is too harsh. It is worth recalling that the High Court had sentenced the Petitioner to 16 years imprisonment with a non-parole period of 15 years. This was reduced by the Court of Appeal to imprisonment for 13 years with a non-parole period of 11 years. This was a significant reduction. It must also not be forgotten that the victim of CSA was a 3 year old girl. She was, quite naturally, in pain due to heavy bleeding from the vagina. These broad facts are enough to persuade me to desist from interfering in the sentence awarded to the Petitioner.

[18] It seems to me that the years of imprisonment awarded by the High Court was adequate in the circumstances of the case, though not necessarily for one of the reasons recorded. Disagreeing with that particular reason, it was reduced by the Court of Appeal. However, since notice of enhancement of sentence has not been given to the Petitioner and even the prosecution has not petitioned this Court for its enhancement, I desist from proceeding further in the matter.

[19] Cases of CSA and sexual assault on adults require special attention. This Court has devoted much time and effort and considerably deliberated on sentencing the offender. Reference may be made in the first instance to ***Aitcheson v. State*** [2018] FJSC 29. Importantly, this Court noted painful statistics published by the Director of Public Prosecutions (DPP) regarding an increase in cases of sexual offences. Over a period of a little over three years (from 2015 to September 2018) there were 995 survivors, including 140 under 8 years of age. It was noted that *"this court now has many more such cases coming before it. This sitting is also remarkable for the number of such cases listed for consideration."*

[20] In ***Kumar v. State*** [2018] FJSC 30 this Court observed: "The rape of children and juveniles by both close relatives and members of their extended family has become increasingly prevalent over the years. Some people have described it as reaching epidemic proportions." With regard to the statistics provided by the office of the DPP, it was observed that they were not limited to the rape of children and juveniles. They

included attempted rape, abduction with intent to rape, abduction with intent to have carnal knowledge, indecent assault, defilement and sexual assault.

[21] Every sexual assault, more particularly a rape is a horrendous and pernicious violation of bodily integrity. No one, other than the survivor, can appreciate what she or he has gone through, not only in physical terms but also psychologically and socially. With social stigma attached to the incident, occasionally the survivor is discriminated against and ostracized. Therefore, an incident of sexual assault must be considered in a larger canvas and not merely as a crime.

[22] The Petitioner has not made out any ground for grant of special leave to appeal to this Court. Accordingly, leave is refused and the petition is rejected. The sentence awarded by the Court of Appeal is reluctantly confirmed.

The Orders of the Court:

1. The Petitioner's Notice to file additional grounds of appeal is rejected.
2. Special leave to appeal against the sentence awarded to the Petitioner is refused.
3. The sentence of 13 years imprisonment with a non-parole term of 11 years awarded by the Court of Appeal is confirmed.

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Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

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

....
Hon. Mr. Justice Madan B. Lokur
JUDGE OF THE SUPREME COURT

Solicitors:

Petitioner in person
Office for the Director of Public Prosecutions for the Respondent