IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0017 of 2020
[On Appeal from the Court of Appeal Criminal Appeal No: AAU0007/14; HAC 79 of 2012S]

BETWEEN: **K.N.P.**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Mr. Justice Isikeli Mataitoga, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: **Petitioner in Person**
Ms P. Madanavosa for the Respondent

Date of Hearing: **13th June, 2023**

Date of Judgment: **29th June, 2023**

JUDGMENT

Gates J

[1] On the 16th of May 2023 the petitioner lodged written submissions in support of his petition stating that his appeal has merits. He argues that he meets the requirements of Section 7(2) of the Supreme Court Act and points to a grave miscarriage of justice. It has

to be said with respect, his petition and arguments are confusing. They do not make a case for this court to intervene and to reverse his convictions.

[2] He was not represented at the trial, or now before us. He was represented however, before the Court of Appeal and the single judge.

[3] On 14th March 2013 he was convicted in the Suva High Court on all charges before a judge and following the unanimous opinions of the assessors. The information set out 2 counts of indecent assault and 5 counts of rape. He was sentenced to 17 years imprisonment on all of the rape charges and 3 years imprisonment on the indecent assault charges. All terms were made concurrent with each other. The non-parole period was 16 years.

[4] The judge ordered that the names of the complainant and the petitioner be permanently suppressed to protect the privacy of the complainant.

<u>The evidence</u>

[5] The complainant gave evidence for the prosecution first. This was taken by skype whilst she was at home. She was accompanied by her grandmother, a WPC Maria Daurewa, an IT personnel from the DPP's office, and one also from the Judicial Department.

[6] At the time of giving evidence the complainant was aged 16 and had been studying in Form 6.

[7] She was permitted to give evidence by this method because her health was deteriorating fast as she had terminal bone cancer. In fact she died 3 months after the trial. At the time of giving her evidence the complainant was visibly in pain and breathless. She was receiving morphine for the pain. She told the court she was "*not feeling too good*."

[8] From the age of 8 years she did not have a good relationship with her father, the petitioner. She said he was violent and brutal towards her. She used to receive frequent beatings with a stick. The sexual assaults commenced when she was 8 years old, and in Class 3. Whilst the mother was in another room and the complainant was sleeping, the petitioner came and stroked her face, rubbed her chest, and put his finger into her vagina.

[9] She struggled and argued with him. He told her to be quiet, threatened her not to tell anyone or he would beat her up. This was in 2004. He did it again later in the year. It happened when she was bathing. He entered the bathroom. He took off her pants and fondled her vagina. He tried to force his penis into her vagina, and the same again struggle and argument took place culminating in his threats that if she told anyone he would beat her up.

[10] She said he started to do it more frequently, twice a week from 2004 to 2008. He would fondle her vagina, breast and buttocks. She was very disgusted. She did not tell anyone because she was afraid of him because he often beat her up.

[11] In 2008 when she was 12, he first had vaginal sex with her. It occurred when no one was at home. He put a pillow on her mouth. His penis penetrated her, she felt liquid on her side and there was blood on her bed sheet. She cried because of the pain she was in. Again he threatened her as before.

[12] The vaginal sex occurred frequently from 2008 onwards to November 2011. At the time she felt sick, disgusted, and afraid of him.

[13] In November 2011 she was diagnosed with bone cancer. In 2007 she had begun to experience pain which increased with time. Her leg began to swell. At the time of the examination and the x-ray the doctors discovered she was 4 months pregnant. She broke down in tears. Her mother questioned her as to who the father was. At first she would not tell. Then she said it was her father. She told the police that she did not agree to, or consent to, those things that her father had been doing to her.

[14] The petitioner cross-examined her. She said "*all that I remember about my father when I was young was how brutal and selfish he was*." She did not know why he was always beating her. She was cross-examined at some length but she maintained her stance. He suggested her cousin had come to her room. She said that was not true. She locked her room in 2011 to stop the petitioner from coming to her room anymore. In 2012 she was admitted to hospital because of her cancer. It was her grandmother who took her.

[15] The complainant's mother gave evidence and said the petitioner was the father of the complainant and of her two other children. She was often away from home because of her work commitments. She said the petitioner was a good husband and father at first. He was a family man. Later on he was unemployed and he was frustrated. She noticed he was at times aggressive and abusive towards the complainant.

[16] She said her daughter, the complainant, was very sick when she came to give her evidence. The doctor gave her only 1 month more to live. She is now breathless and in constant pain. She has morphine. She said she had to massage her. At that point the mother broke down and cried in court. The complainant had been sent to New Zealand for treatment. She could no longer go to school. She was in and out of hospital, culminating in the amputation of her (left?) leg.

[17] She gave evidence of the complainant's eventual capitulation when she admitted that her father was responsible for her pregnancy.

[18] After this evidence, the petitioner said he did not want to cross-examine his wife.

[19] Dr Kedrayani Namudu of the paediatric unit CWM Hospital tendered a medical report on the complainant. She had examined the complainant on 01.03.2012 and made out the report. She knew the complainant was a cancer patient, having osteosarcoma on the right fibula. From an ultra sound scan it was apparent the complainant was pregnant of 20

weeks duration. She told the court that it had been decided in view of her state of health and the treatment of her cancer that the pregnancy would be terminated.

[20] At this point the petitioner wished to challenge the interview statement, and so a trial within a trial commenced. The petitioner stated he did not want to give evidence in the trial within a trial, or to call witnesses. The judge ruled the admission voluntary and admissible.

[21] The main trial resumed. Acting ASP Shanti Lal of Valelevu Police Station had interviewed the petitioner on 02.03.12. After the caution interview statement was exhibited the petitioner was invited by the judge to challenge the witness, if he wished to do so, in cross-examination. It was suggested by the petitioner to the witness that he had forced the statements out of him, that he had threatened him, made unfair promises (what these were was not revealed) and that he had assaulted him. The witness denied all of these allegations.

[22] In his caution interview the petitioner said he had been able to meet his wife prior to the interview. He said their home belonged to his in-laws (the grandmother of the complainant). He informed the court who was living in the house at that time. For the last 3 years he had been farming and from time to time he did carpentry work. He admitted the complainant was his biological daughter. As for the allegations of indecent assault he admitted the acts but said he did them with her consent. He admitted the circumstances and details of that offending.

[23] When it was suggested to him that, as her father, he knew it was wrong. He said he knew.

Q.38: Then why you have done that?

A: remain silence.

[24] He admitted from 2008 he had sexual intercourse with the complainant on several occasions. It occurred in the day time when he found her alone, and mostly at night. He denied beating her. He gave details of what he did to her. He said it was with her consent.

[25] When he discovered she had bone cancer he stopped having sex with her. On 28th February 2002 his wife took the complainant to the hospital because she was sick with the bone cancer, her leg was swollen, and she was vomiting. It was found then that she was pregnant.

[26] As to why he did those things to his own daughter, he explained that he thought she might get involved in sexual activities with other boys "for which I will not accept it." It was then that he approached her.

[27] DC Shashi Kumar was the final prosecution witness [PW6]. He was the officer who charged the petitioner. He said the petitioner did not complain to him about anything, and he was co-operative. After the charges were read out to him he was asked if he had anything to say. The petitioner was recorded as saying:

> *"I confess to my crimes and I am saying sorry to my family and especially my wife and children and also to my mum and dad and all my in-laws, my relatives and friends and my church members and that I have accepted my wrong doing. I hope that all of them find a place in their heart to forgive what I have done. All I am asking to please to pray for me for I know the place I am going for me. I realise my mistakes and to find myself a way to make me better person."*

[28] The petitioner had no cross-examination for the witness. He said: *"I don't want to challenge PW6's evidence. PW6 was nice to me."* The prosecution closed its case and the petitioner elected to remain silent. He said he had no witness to call. The petitioner made a closing speech. He said the complainant's evidence was the evidence of a child. He asked the assessors to look at the nature of his case, and to think about it. He asked the assessors to do what they think is right. *"My wife and kids still need me*," he said.

[29] Counsel for the petitioner argued 5 grounds before the Court of Appeal, leave having been granted by the single judge to enlarge time because of the lateness of the filing of the appeal.

[30] In fairness to the petitioner I will traverse the grounds his counsel brought to the Court of Appeal together with 2 fresh points to this court arising from his submissions on corroboration and sentence. He had been granted leave to appeal against sentence which was not pursued by his counsel before the Full Court.

Need for consideration of corroboration

[31] It is suggested that there was no corroboration of the complainant's evidence. There is no longer a requirement for corroboration in cases of this nature.

[32] Section 129 of the Criminal Procedure Act [CPA] provides:

> *"Division 6 – Miscellaneous Evidentiary Matters*
>
> *129. Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."*

[33] This means that in such trials held subsequent to the coming into effect of the CPA 2009 judicial officers will not be required to warn assessors of the danger of convicting without corroborative evidence. This applies to those trials held subsequent to the commencement date of the CPA including those with allegations of a sexual nature relating to offences committed before the commencement date. The Law now accepts that there is no inferiority of a witness by reason of the witness being a child, a woman, or the victim of a sexual offence. This ground fails.

Vulnerable witnesses and skype evidence

[34] The complaint of the petitioner is that the skype evidence was "*highly unreliable*," since from time to time the complainant looked back at her grandmother whilst giving evidence. He also complains that the complainant was under morphine treatment and the judge

should have given directions on this since it is an hallucinative drug. He argued she was "*a coached witness loaded with morphine.*"

[35] Because of the deteriorating condition of the complainant the trial judge had referred to the provisions of section 295 of the CPA sub-section (4) of which stated:

> *"(4) In considering what directions (if any) to give under section 296 the judge or magistrate shall have regard to the need to minimize stress on the complainant or the vulnerable witness, while at the same time ensuring a fair trial for the accused."*

[36] His Lordship correctly acceded to prosecution counsel's application pursuant to section 295 for the taking of the complainant's evidence as a vulnerable witness by skype from her home.

[37] On 8th March 2013 the judge dealt with the interlocutory arrangements for the trial. The record of proceedings read as follows:

> *"Prosecution:*
>
> - *We are making an application pursuant to section 295 and 296 of the Criminal Procedure Decree 2009 to:*
>   *(i) Take the complainant's evidence through skype.*
> - *We rely on the case of* ***State v A. K. Singh*** *HAM 005 of 2012, Lautoka which allowed the evidence of the complainant to be taken through Skype/video link (see paragraph 7).*
> - *Apply for a police officer [female] and court officer [female] to be present at the scene, where the complainant is at. We also apply for complainant's grandmother to be her support person, at the scene, but she will not be giving evidence or coaching the complainant witness.*
> - *We also apply for a close court and complainant's and accused's name to be suppressed. I rely on Section 9 and 12 of Juveniles Act.*
>
> *Accused:*
>
> - *I have no objection to the complainant's evidence taken by Skype/video link.*
> - *I have no objections to the female police officer and female court clerk to be all the place where complainant will be giving her evidence.*
> - *I have no objection to a close court, when complaint is giving evidence and I have no objections to name suppression for complainant and accused.*

- *I have no objection to the grandmother been the support person for complainant's during the hearing, but she will (not) coach the witness.*

Court:
1) Prosecution's above applications are granted.
2) Adjourned 11.03.2013 – hearing starting at 11.30am.
3) Remand in custody
4) Above orders to be formally drawn up."

[38] There is no basis for criticism of the trial judge's decision to make provisions for this vulnerable witness. The order for skype was correct, and the complaints of the petitioner should, if significant, have been brought to the attention of the judge during the course of the evidence. This was not done. There is no reason to think that the complainant in her dire situation was less accurate or less truthful in giving her evidence. No special directions, concerning her health or the morphine, were required from the judge. This grounds fails.

DNA Testing

[39] The petitioner was anxious to distance himself from being responsible for the daughter's pregnancy. He tried to blame her cousin David. But no evidence was produced to support this allegation. It remained merely an allegation put in cross-examination, denied by the complainant, and with no other witness supporting the suggestion. The petitioner said there should have been a DNA test to establish paternity. This point was irrelevant. There was evidence illustrating what he had been doing, namely full intercourse with the young daughter over several years. He had admitted this in his caution interview statement. Though it was his right to keep silent, there was no supporting evidence suggesting anybody else was responsible for the pregnancy. This ground fails.

Sentence

[40] Though the petitioner filed an appeal with the Court of Appeal which included an appeal against sentence, the ground was never argued before the Court. The Court of Appeal did not refer to such a ground. Strictly speaking there could be no appeal against sentence

therefore to this court, without a prior judgment of the Court of Appeal on the matter. Nor did the petitioner argue this ground in his written submissions to this court filed on 16th May 2023.

[41] An affidavit, not grounds, was lodged with this court on 21st February 2022 in which the petitioner alleged that the sentencing judge did not take into account the time he had spent on remand awaiting trial. That was a period of 1 year 1 month 2 days. For the purposes of sentencing discount that should be rounded up to a period of 12 months.

[42] That criticism is not correct. The judge did in fact take that period into account. Significantly, the judge referred to the apology the petitioner had made in court at the mitigation stage prior to sentence, to his wife, children, and family. Earlier, prior to his offending, he had been a good father. Lastly mitigation was found by the judge in the remand period already served. For all of these factors, 3 years was granted to be deducted from the figure of 20 years.

[43] This Court has suggested in an earlier decision, though one delivered after the judge's sentencing in this matter, that the better way to arrive at the sentence to be served is to calculate the sentence after aggravating factors and mitigating factors have been taken into account from the period of imprisonment fixed within the tariff of sentences, then separately and finally, to deal with the discount in arriving at the actual time to be served: **Apakuki Sowani v The State** (CAV0038/2015; 21st April, 2016 at para.17-18).

[44] The judge said (then) that for his 19 years he had spent on the bench the petitioner's case was the worst case of parental abuse he had ever come across.

[45] Referring to the aggravating facts his Lordship said:

> *"A child growing up in a family expects comfort and support from her parents. This is even more so when it concerned the special sacred relationship between a father and his daughter. A father is expected to counsel and support her daughter to become a confident and aspiring member of society. In your case, you did exactly the opposite. Instead of being a pillar of support for your eldest*

daughter, you completely ruined her life by sexually abusing her from the young age of 8 years old.

The above abuse was not a one only event. You repeatedly assaulted her indecently between 2004 to 2008 – a period of 4 years. At the time, she was aged 8 to 12 years old. She was still a child at the time. In fact, you robbed her of her childhood. You did indecencies on her that were beyond description.

From 2008, at the age of 12 years, you began to repeatedly rape your daughter, at least twice a week. You accompanied these dreadful crimes with threats to her physical safety. You did this secretly in the comfort of your home. These rapes committed from 2008 to November 2011 – a period of 3 years. You only stopped when it was discovered that she was suffering from bone cancer.

Your abuse was only discovered when your daughter was found to be pregnant, with you child, on or about February 2012. Only then, with the support of doctors and her mum, she was able to get over your threats, and reveal your continued abuse of her. For the miseries you have brought on this girl, you must accept that you will have to forfeit your liberties for a very long time."

[46] The matter does not end there. Every person is entitled to plead not guilty and to challenge the prosecution case. In the petitioner's case he had put his dying daughter aged 16 years through the strain of giving evidence in her condition. She had already had one leg amputated and she was in great pain. She was breathless, having to be supported by morphine, and with her grandmother beside her. Yet having made allegations against her the petitioner never produced any evidence against her whatsoever. The petitioner had already admitted what he had done all those years since she was 8. The evidence which he did not challenge, in the charge statement, demonstrated he had fully accepted that her evidence was truthful. Yet he put his ailing daughter through this courtroom ordeal. All along the petitioner conducted his case in this way, knowing he was not going to bring any contrary evidence. This was callous and selfish, and because of it his apologies carry almost no weight. There has been no genuine remorse.

[47] It is a truly shocking case, for which the petitioner has receiving condign yet temperate punishment. Had there been a valid appeal on sentence, undoubtedly it would have failed.

Mataitoga, J

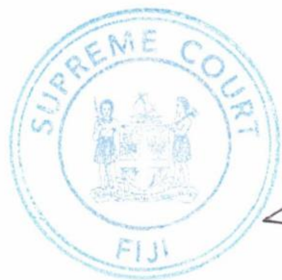
[48] I support the reasoning and conclusions/orders made in the judgement.

Qetaki, J

[49] I have considered the judgement in draft and I entirely agree with it and the reasoning.

Orders:

1) *Special leave refused.*
2) *Petition dismissed.*
3) *Conviction and sentence affirmed.*



Hon. Mr Justice Anthony Gates
Judge of the Supreme Court

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SOLICITORS:

Office of the Director of Public Prosecution for the Respondent