IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0029 of 2022
[Court of Appeal No. AAU 179 of 2016]

BETWEEN	:	**RAJNIL NAVIN CHANDRA**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice Salesi Temo, Acting President of the Supreme Court**
		The Hon. Justice Lowell Goddard, Judge of the Supreme Court
		The Hon. Justice Isikeli Mataitoga, Judge of the Supreme Court
Counsel	:	**Petitioner in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**10 June 2024**
Date of Judgment	:	**27 June 2024**

JUDGMENT

Temo, AP

1. I entirely agree with the judgment and orders of Goddard, J.

Goddard, J

Introduction

2. The petitioner was convicted on one count of rape under Section 207 (1) and (2) (a) of the Crimes Act, 2009 following a trial before a judge and assessors and sentenced to thirteen

years imprisonment with a non-parole period of ten years. He seeks the special leave of this Court to appeal against the decision of the Court of Appeal confirming the sentence imposed as correct.

Background

3. The rape occurred on 17 March 2016, at Tuatua, Labasa in the Northern Division.

4. The facts as proven at trial were set out by the trial judge in his sentencing decision as follows:

> *(i) The 22 year old complainant was employed by your mother in her shop. On 17th March 2016, the complainant was invited by your mother into her house to help her with some housework. After her work, when she was to return home, you took her in your vehicle to drop her. Instead you took her to your house ignoring her pleas to let her get off.*
>
> *(ii) Upon reaching your house, you forcefully removed her clothes and inserted your penis into her vagina in the vehicle. You gave a piece of cloth to wipe blood from her vagina. Before dropping her off that evening you promised to marry her.*
>
> *(iii) She returned to her house and reported the matter to her mother. Her mother then reported the matter to Police.*
>
> *(iv) Her marriage which was to take place in December 2016 has been put on hold due to this incident.*

5. The sole issue at trial was whether the complainant had consented to having sexual intercourse with the petitioner. The assessors were unanimous in returning opinions of guilty, with which the trial judge agreed in a reasoned judgment on 24 November 2016.

The sentencing decision

6. In determining a sentence of imprisonment of thirteen years with a non-parole period of ten years as appropriate in the circumstances, the judge referred to the serious nature of the crime of rape and to the maximum punishment of life imprisonment. He then proceeded to compute

the appropriate sentence by initially referring to the tariff for rape of an adult being a term of imprisonment ranging from 7 years to 15 years ***(***as per ***Mohamed Kasim v The State*** *(unreported)* Fiji Court of Appeal Cr. Case No. 14 of 1993; of 27 May 1994).

7. Within that range the judge selected an appropriate starting point to reflect the circumstances and gravity of the petitioner's offending by reference to the following guidance in ***Koroivuki v The State*** [2013] FJCA 15, AAU0018.2010 (5 March 2013):

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

8. Applying this guidance and *"[c]onsidering the nature of offending, and in the light of the above guiding principles"* the judge took as his starting point a term of 10 years imprisonment but without giving reasons. He then added 3 years and 6 months for the aggravating factors, which he identified as follows:

> *a. significant degree of opportunistic planning;*
> *b. taking advantage of the victim's vulnerability;*
> *c. display of total disregard to the victim's wellbeing;*
> *d. the significant age gap between the complainant and the accused;*
> *e. breach of trust;*
> *f. continuing psychological trauma of the victim.*

9. From that sentence of 13 years and 6 months the judge deducted 6 months for the mitigating factors, which he found to be limited to the petitioner's co-operation with the Police during the investigation. A claim by the petitioner that he was a first offender and possessed previous good character was ignored, as it transpired he had three previous convictions for offending involving some degree of violence on victims, albeit not sexual violence.

10. Allowance was made for the one mitigating factor of co-operation with the Police. The end sentence was 13 years imprisonment.

11. Finally, a 10 year non-parole period was imposed under Section 18 (1) of the Sentencing and Penalties Decree.

The grounds of appeal

12. The appellant initially applied for leave to appeal against both his conviction and sentence. On 2 August 2019, a single Judge of Appeal granted him leave to appeal against conviction on one ground; and leave to appeal against sentence on three grounds.

13. The petitioner subsequently proceeded only with his appeal against sentence. The three grounds he articulated in support of that are as follows:

    (i) That the Learned Trial Judge imposed a sentence which was harsh, excessive and unconscionable and further took into consideration irrelevant matters and failed to take into consideration relevant matters.

    (ii) That the Learned Trial Judge erred in law in failing to correctly apply the principles of sentencing before setting a minimum term to be served before pardon may be considered.

    (iii) That the Learned Trial Judge took into consideration irrelevant matters and further matters which were not in evidence and failed to take into consideration relevant matters when sentencing the appellant to thirteen years and ten years non-parole period."

The Court of Appeal's judgment

14. The Court of Appeal approached its task on the basis that, although the appeal grounds were segregated into three, in effect the challenge was to the overall application of the relevant sentencing principles. The Court therefore determined that it would consider all three grounds together, in order to determine whether there had been an error of law affecting the lawfulness of the ultimate sentence imposed.

15. As the Court discerned, the issue was whether the trial judge had erred in selecting 10 years as the appropriate starting point in the absence of any evidence of violence having been used. A further consideration was whether the Judge's identification of a starting point of 10 years lacked consistency with similarly circumstanced cases. Several decisions were advanced by the petitioner to support a lack of consistency in his case but of these only the decision in ***State v Chand*** [2014] FJHC 901; HAC043.2013LAB (10 December 2014) was of any relevance.

16. In **Chand**, a seven year starting point had been adopted. The accused and the complainant were almost of similar ages in their early twenties. They were living in the same neighbourhood and there was no evidence of the complainant having been tricked into submission for forcible sexual intercourse. The end sentence arrived at was 10 years.

17. In the petitioner's case, the Court of Appeal noted that the trial judge had taken guidance from the principles in **Koroivuki v the State,** in an effort to avoid any aggravating factors being counted twice and thereby disproportionately enhancing the sentence. The Court observed that the best way to avoid any such double counting was to select an appropriate starting point "in relation to the offence at hand":

> *"[23] The concept of tariff that is hardened into the sentencing structure in Fiji seeks to ensure uniformity and consistency in sentencing. The selection of the starting point of the sentence, which is an important step in the process, in my view, is an opportunity where a great deal of consistency and uniformity can be infused into, based on acceptable principles."*

18. As the Court however further observed the trial judge in the petitioner's case did appear to have fallen into the trap of double counting when he selected a starting point of ten years, based only on *"the nature of the offending"* and on nothing more.

19. In relation to this, the Court said*: ...when one looks at the aggravating factors referred to in the sentencing ruling, they also could encompass in the 'nature of the offending'. The aggravating factors considered by the learned trial judge were:*

> *"a. significant degree of opportunistic planning;*

b. taking advantage of the victim's vulnerability;
c. display of total disregard to the victim's wellbeing;
d. the significant age gap between the complainant and the accused;
e. breach of trust; and
f. continuing psychological trauma of the victim."

In the circumstances, ... the element of double counting appears to have innocuously found its way in the making of the ultimate sentence. ... such a scenario has the effect of making an error in the application of sentencing principles.

20. Notwithstanding the Court of Appeal identified the error of double counting in the computation of the final sentence, the Court felt able to uphold the sentence of thirteen years imprisonment with a non-parole period of 10 years as being *"well within the prescribed sentencing range of 7-15 years for adult rape",* finding*:*

> *[34] The sentence is just and it meets the ends of justice. It also serves to satisfy the objects and purposes of sentencing under Section 4 of the Sentencing and Penalties Act, 2009. In the circumstances, I am not inclined to interfere with the sentence. I would, acting in terms of Section 23 (3) of the Court of Appeal Act, make order dismissing the appeal against the sentence.*

Discussion

21. Two matters arise for consideration: first, whether there was indeed an error of law in terms of a double counting of aggravating factors; and second, whether the end sentence nevertheless fell within the acceptable range for a single instance of rape of an adult; or it fell outside that range to a degree that requires the intervention of this Court.

22. There is no doubt that the trial judge fell into the trap of double counting as acknowledged by the Court of Appeal. In fairness to the sentencing judge however - and as counsel for the State fairly pointed out - the sentencing in this case preceded the now well-established guidance in decisions such as ***Senilolokula v State*** [2018] FJSC 5; CAV0017.2017 (26 April 2018) ***Kumar v State*** [2018] FJSC 30; CAV0017.2018 (2 November 2018), and in ***Nadan v State*** [2019] FJSC 29; CAV0007.2019 (31 October 2019).

23. The difficulty encountered when a risk of a double counting arises because the sentencing judge has given no indication why a particular start point was selected, was discussed by Mr Justice Keith in **Nadan v State** (supra):

> *"[41] ...The fact is,..... we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors, which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had, therefore, fallen into the trap of double counting..."*

24. In the earlier decision of **Kumar v State** *(supra,)* Mr Justice Keith had considered the approach that might be taken in the sentencing exercise if the risk of double-counting were be avoided:

> *"[56] ...If judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any other aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.*
>
> *[57] ... a common complaint is that a judge has fallen into the trap of "double-counting", ie: reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *[58] ... the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided."*

25. As it is accepted there was an error of double counting in the present case, the question is whether the acknowledged double counting has enhanced the petitioner's sentence disproportionately, resulting in an end sentence that is outside the accepted range for

comparative offending. Sentences outside the accepted range will not satisfy the objects and purposes of sentencing under section 4 of the Sentencing and Penalties Act, 2009.

26. The importance of uniformity in sentencing, as giving the appearance of equality before the law and thereby maintaining public confidence in the criminal justice system, was referred to in **Koroivuki *(supra)*** above. It was also referenced by the Court of Appeal in the petitioner's case, when the Court observed:

> *"[21] The process of sentencing and its decision-making is a complicated exercise of judicial functioning, which, more often than not, appears to get affected by lack of uniformity. As a result, disparity in sentences is often seen, which certainly causes concern to accused persons, who stand charged for the same offence in identical circumstances; and, also to the system of justice."*

27. The petitioner referred the Court to a number of cases designed to demonstrate that a starting point of ten years is usually reserved for cases concerning child or juvenile victims. Counsel for the State did not provide any comparable cases. A survey of cases that have come before this Court over the past few years involving the rape of an adult woman indicate an end sentence in the range of ten years is usually called for. However, no two cases are factually identical and thus there can be no slide rule approach to the sentencing exercise.

28. In the outcome, a starting point of 8 years rather than ten years for the petitioner's offending would place it appropriately at the lower end of the accepted range of 7 to 15 years for the rape of an adult woman. The addition of three further years for the aggravating factors identified by the Court of Appeal - of premeditation, breach of trust and a total disregard for the victim's well-being, would provide an appropriate uplift to reflect the callousness of his behaviour. This results in an end sentence of 11 years, which is still at the upper end of the identified range for a single instance of adult rape without the addition of gratuitous violence beyond that inherent in the act of rape itself. That in my view is an appropriate end sentence for the petitioner's offending in this case.

29. A non-parole period of 10 years remains appropriate, given the lack of remorse and lack of insight still evident on the part of the petitioner. Remission periods are designed to afford an

offender a reasonable period in which to rehabilitate before re-entering society. As the petitioner in this case still persists in protestations of innocence which are both incredible and insulting to his victim - and evince a total lack of empathy and understanding of his actions - his prospects of reform must be regarded as slight.

Jurisdiction for granting special leave to appeal

30. Under section 98(4) of the Constitution of Fiji, an appeal from a final judgment of the Court of Appeal can only be brought by the leave of this Court. The granting of leave is a discretionary matter.

31. Under section 7(2) of the Supreme Court Act, leave must not be granted in a criminal matter unless:

> *(a) a question of general legal importance is involved;*
> *(b) a substantial question of principle affecting the administration of criminal justice is involved; or*
> *(c) substantial and grave injustice may otherwise occur.*

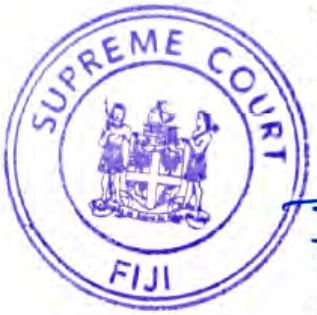
32. Ensuring even-handedness in the dispensation of justice is of the utmost importance and can be notoriously difficult to achieve in the area of criminal justice sentencing. The development of tariffs identifying ranges of sentences for categories of broadly similar offending has done much to assist the courts in achieving even-handedness. Where a marked non-conformity with an identified range of sentencing levels occurs, this has the potential to distort what has come to be regarded as certain in the law and may also result in a substantial and grave injustice.

Mataitoga, J

33. I have read the judgment in draft and I concur with the reasons and conclusion.

Orders of the Court:

1. *Special leave to appeal the sentencing judgment of the Court of Appeal is granted.*
2. *The sentence of a term of imprisonment of thirteen years with a non-parole period of ten years is quashed.*
3. *In lieu a sentence of a term of imprisonment of eleven years is imposed with a non-parole period of ten years.*



The Hon. Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

The Hon. Justice Lowell Goddard
JUDGE OF THE SUPREME COURT

The Hon. Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT

Solicitors:

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