IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0024 of 2023
[Court of Appeal No. AAU 144 of 2015]

BETWEEN : **KATOKAITI TUTARA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Justice Terence Arnold, Judge of the Supreme Court
The Hon. Justice Lowell Goddard, Judge of the Supreme Court

Counsel : **Petitioner in person**
: **Mr. T. Tuenuku for the Respondent**

Date of Hearing : **15 August 2024**

Date of Judgment : **29 August 2024**

JUDGMENT

Gates, J

Introduction

[1] The petitioner is before the Court petitioning only against his sentence. He claims the total sentence of 16 years imprisonment on each of five counts of rape committed on two of his biological granddaughters was outside of the tariff. He claims it was a sentence that was

harsh and excessive. The non-parole period ordered was 15 years. All sentences were to be served concurrently.

[2] Originally he had filed for appeal before the Court of Appeal against conviction only. This appeal had been filed within time. He filed separately an appeal against sentence on 30th of January 2017. This was out of time by 1 year 2 months.

[3] The Full Court in its judgment on 29th of September 2022 set out what then happened procedurally:

> *"[7] …Thereafter, the appellant had tendered three abandonment notices in Form 3 in respect of his conviction and sentence appeals on 19 March 2019, 02 July 2019 and 11 July 2019. However, in May 2019 he had changed his mind and wanted to proceed with his appeal. Again in October 2019 he had stated that he would proceed against his conviction appeal. R Vananalagi & Associates had filed an application for extension of time in respect of the appellant's sentence appeal along with submissions. Thereafter, the Legal Aid Commission had taken over the appellant's appeal and indicated to this court on 22 June 2020 that the appellant would proceed only against sentence and abandon the conviction appeal and tendered written submission only on the issue of enlargement of time to appeal against sentence. The state had responded only on the sentence appeal."*

[4] Because the petitioner had abandoned his appeal against conviction in the Court of Appeal which therefore had dismissed that part of his appeal, this Court has no jurisdiction to entertain a petition against conviction.

[5] At the High Court trial the petitioner faced five counts of rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. Two counts were in reference to victim A, and three in reference to victim B. At the time of the offences the petitioner was 63 or 64 years old. The girls were 15 and 13 years old respectively. The mothers of the complainants were his daughters. The offences took place on Rabi Island, a rural area within the Northern Division, and the hearing took place before the Labasa High Court.

Facts

[6] The parties lived in villages on the island. In her evidence A said she sometimes stayed with her mother and sometimes with her grandfather, the petitioner. In 2013 she had been staying with her grandfather. On the 20th of July 2013 she was sleeping when the petitioner came and told her to get some firewood.

[7] Once outside, the petitioner cut her trousers with his cane knife. She had been wearing a skirt and shorts. He laid her down, throwing her shorts to the bush. Because he was holding a knife she was scared. She was told not to shout or scream and not to be scared. He took off his pants, and laying on top of her, put his penis into her vagina. She felt pain in her vagina and thighs.

[8] She told him she was in pain. When noises were heard coming up the road he told her to stand up. She said she was in pain, explaining why she could not do so. He insisted that she should stand up or he would kill her with the cane knife. She said she was really in pain but he told her to bear it.

[9] On the next occasion, 24th January 2014, the petitioner told her to come with him to get some root crop (papai). He asked her if she had had her menstruation. She said "No." He said he wanted to check, and took off her pants. Again she was afraid. He told her not to tell others. He spoke to her in a harsh tone. She was scared. He laid her down beside the root crop in the plantation. He took off his pants and she saw his penis. He went on top of her inserting his penis into her. She told him she was in pain.

[10] She said he spoke using, "his heavy tone." She "was afraid of grandpa, that is Tutara." She did not consent to his treatment of her, nor did she complain to anyone. He had told her not to tell anyone about the incident, and in court, she said, "I am afraid of him." Later she complained to the police.

[11] Complainant B gave her evidence in court when aged 15 years. She had been 13 at the time of the offences. Sometimes she stayed with her aunt in Uma Village, at other times with her grandfather in Tapian Village.

[12] On 12th of January 2013 the petitioner told her to come with him to the plantation. They cleaned up the plantation. Afterwards he cleared a space for himself and B. He pulled her hand and told her to lie down. She said "No." He pushed her. She fell face down. He unbuttoned his pants, and took them off. She was staring at him and was afraid. He held the cane knife. He told her not to shout or he will kill her. He inserted his penis into her vagina which she said was very painful. She was bleeding. Afterwards he told her to wear her trousers. She could not walk, but forced herself. She said her legs were really weak. She was 13 years old at the time.

[13] There was a second time, on 20th of January 2014. Again they went to the plantation. The petitioner cleaned the space for them. He called her. She said "No." He pushed her to the ground. He told her not to make any noise or he would kill her with the cane knife. He took off his clothes and laid on top of her. She could not move as he was heavy. He did the same to her as before. Then they went home. She had a headache and her vagina was paining.

[14] On a third occasion, 28th of January 2014, she was folding clothes in the petitioner's house. The grandmother was sick. Complainant B was told to look after her by her mother. Others had gone outside. This time the petitioner held a kitchen knife. She was inside one bedroom. She was pushed to a mattress on the floor. He tied her mouth with a piece of cloth, tied both her hands, and tied her ankles. He did the same again to her. Her vagina was paining. There was pain to her thighs and stomach.

[15] The complainant B told the police about the three incidents of rape. In cross-examination she had said that she could not run away because he had a cane knife in his hand, and because there were bushes all around. Their home was far away from the plantation.

[16] The petitioner gave sworn evidence. He did not call any witness. His evidence was that none of the events, as related by his granddaughters, ever happened. His case was one of total denial.

Jurisdiction of the Supreme Court

[17] This court is not a second Court of Appeal. Its power to intervene is limited. Even where an error or irregularity in the trial or in the reasoning of the Court of Appeal is discovered, this court must be satisfied there exists (i) a question of "general legal importance"; or (ii) there is a "substantial question of principle affecting the administration of criminal justice"; or (iii) substantial and grave injustice may otherwise occur." If none of the above considerations are present there is no power to reverse the orders below. It is significant that considerations (ii) and (iii) both require the issue to be "substantial."

[18] It would appear therefore that no question of general legal importance is raised here and neither is anything of substance shown to permit intervention on (ii) and (iii).

Judge's sentencing comments

[19] On the day of sentence 23rd of October 2015, his Lordship referred to the tariff for rape of juveniles in ***Raj v The State*** [2014] FJSC 12; CAV0003.2014 (20 August 2014). That case had accepted that the tariff for that category of rape to be a sentence between 10 – 16 years imprisonment. In 2018 in ***Aitcheson v State*** [2018] FJSC29; CAV0012.2018 (2 November 2018) the Supreme Court raised the tariff to 11 – 20 years. It must always be remembered that the "the actual sentence will depend on the mitigating and aggravating factors."

Grounds

[20] Orally before us, the petitioner said he had been sentenced to 12 years imprisonment (in fact, it was to 16 years imprisonment). Probably he has less than 7 years to serve now. It had affected him he said, mentally and physically. He asked for a lenient sentence.

[21] Only in one paragraph of his hand written petition does he raise issues with his sentence. He said the sentence was outside of the tariff for child rape 10 – 16 years imprisonment. That was not strictly accurate because his sentence was one for 16 years concurrent on each count.

[22] Since the petitioner is unrepresented, I will traverse issues affecting the final sentence in this matter, most have already been covered more than adequately in the Court of Appeal's judgment. These concern discounts for time spent on remand, double counting, and totality.

Discount for the time spent on remand

[23] The judge referred to the petitioner's time in custody on remand. It was for approximately 1 year and 4 months. Having added 5 years for aggravating factors to the selected starting point on the tariff of 14 years, the judge deducted 1 year 4 months for the remand period. This left a balance of 17 years 8 months. From that, for not having offended over the previous 10 years, the judge deducted a further 1 year 8 months, leaving a balance of 16 years, the eventual sentence on each count.

[24] The complaint in the Court of Appeal was that the judge had subsumed the petitioner's period of remand in the mitigating factors. The argument being perhaps, the remand period should only be deducted after the starting place on the tariff has been selected, and after the adjustments have been made for the aggravating and mitigating factors. Only then should the deduction for the remand time be made.

Section 24: Mandatory or Discretionary?

[25] This issue was raised by the court below. Section 24 of the Sentencing and Penalties Act provides:

> *Time in custody before trial to be deducted.*
>
> 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.

[26] The question of whether to "deduct" the period spent on remand from the eventual sentence to be imposed was held to be discretionary and not mandatory. The word used in the section is "regarded", as opposed to the section heading, "Time in custody before trial to be deducted." Two Supreme Court decisions were referred to, ***Sowane v State*** [2016] FJSC 8; CAV0038.2018 (21 April 2016) and ***Tasova v State*** [2022] FJSC 30; CAV0012.2019 (25 August 2022).

[27] In ***Sowane*** this court had said:

> *"[10] However section 24 does not cast any burden on the Corrections Department. The burden is cast upon the court. The provision is mandatory. For the court **shall** regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless a **court** otherwise orders."*

[28] It is likely that the parties did not rely on, or cite to the court, the decision in ***Vasuca v State*** [2015] FJCA 65; AAU011.2011 (28 May 2015). In that sense Homer had indeed nodded. In ***Vasuca*** Goundar JA usefully considered the meaning of the section and its problem areas, for instance where there has been time spent in custody on more than one set of charges.

[29] His Lordship said at paragraph [14]:

> *"In this jurisdiction, the practice has been discounting or subtracting the remand period instead of backdating the sentence. There is no exact formula on how the discounting should be made. Some judges incorporate the discounting in the combined quantification for all the mitigating factors while some judges turn to give separate discounting for pre-trial detention. The length of the remand period may vary from case to case, and in each case the discretion lies with the sentencing court to comply with section 24 of the Sentencing and Penalties Decree 2009."*

[30] In that sense the choice of the word "mandatory" in ***Sowane*** was over-simplistic. There remains a discretion for a judge not to deduct the time spent on remand. However, I am not

aware of a sentence where this discretion has been exercised, nor have I had my attention drawn to any reasoning as to circumstances where it ought rightfully to be exercised. Goundar JA concluded there remained a conflict in the way the section is set out, with one part mandatory and the other discretionary.

[31] It is clear the duty of the sentencing court is to have regard to the remand period and to make the necessary order. In ***Sowane*** it was said at paragraph [14]:

> *"In doing so it is not necessary to make exact allowance for days or even weeks spent on remand. It depends upon its total significance. In **Basa v The State** Crim. App. No. AAU0024.2005, 24 March 2006 the offender had spent 1 year 1 month and 14 days in custody awaiting trial. The judge had allowed of that period only 1 year to be deducted from his sentence. The court said:*
>
> > *"... When calculating the appropriate sentence for any offence, the Judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was a perfectly proper amount.""*

[32] The way the sentencing judge gave credit for the time spent in custody in remand amongst the mitigating factors, and not at the end of the methodology, could not amount to "acting upon a wrong principle," or an error of law. But courts must be cautious in case the inclusion with mitigating factors could result in unfairness and an excessive sentence.

[33] In ***Sowane*** it had been expressed this way at paragraphs [17 – 18]:

> *"[17] Our attention was drawn to a recent High Court case, when the same issue came up: **State v. SBN** HAC 083/2010 11th April 2016. The learned judge, following the usual sentencing procedure, had arrived at the appropriate sentence. His lordship then went on to order the remaining period (after deduction of time spent on remand) that the offender must serve. The terms of the sentence were set out as follows:*
>
> > *"14. In the result, you are sentenced to an imprisonment term of 12 years with a non-parole period of 10 years. Considering the time spent in custody, the remaining period to be served is:*
> >
> > *Head Sentence – 05 years, 11 months and 26 days*

Non-parole period – 03 years, 11 months and 26 days."

[18] This method has the advantages of simplicity and clarity, and makes order as to the actual minimum period to be served as part of the sentencing order of the court. The interpretation and calculation is not left to Corrections. We conclude this is the proper way to give effect to section 24."

Starting point on tariff and double counting

[34] The judge in his sentencing remarks had stated:

"6. On count no. 1, I start with 14 years imprisonment. I add 5 years for the aggravating factors, making a total of 19 years imprisonment. I deduct 1 year 4 months for time already served, while remanded in custody, leaving a balance of 17 years 8 months. For not offending in the last 10 years, I deduct another 1 year 8 months, leaving a balance of 16 years imprisonment. On count no. 1, I sentence you to 16 years imprisonment."

[35] His Lordship identified and set out what he considered to be the aggravating factors:

"(i) Breach of Trust. You were the complainants' grandfather. Their mothers were your biological daughters. At the time of the offences, they were 13 to 15 years old. As their grandfather, they look up to you for guidance and security. As their grandfather, you were supposed to look after them, and see that no-one harms them. However, you did the unthinkable. Instead of protecting them, you raped them. This was a serious breach of the trust they had in you.

(ii) Rape of children. This type of offending is becoming prevalent in our community. The courts had said so many times before that, it will not idly stand by and let children be treated in this way. It will step in and pass heavy sentences, as a warning to others, not to abuse children. As the courts had repeatedly said before, the children of this country are its future.

(iii) The use of a cane knife to threaten the child complainants. During the offences, you continually used a cane knife and a kitchen knife to threaten your granddaughters before raping them. You are really a coward by threatening children with knives. This is the lowest type of act a person could do to children.

(iv) Use of a rope and cloth to subdue complainant No. 2 in count no. 5. You used a cloth to tie around the complainant's mouth to stop her from

raising the alarm. Then you tied her wrists and ankles with a rope to stop her from resisting you. Then you raped her, while your wife was lying down sick in another room. You should not complain when you are given a heavy sentence to pay for your crimes."

[36] There was some doubt expressed in the Court of Appeal on the selection of the starting point on the tariff [***Raj*** 10 – 16 years; ***Aitcheson*** 11 – 20 years]. The selection may have taken into account part of the aggravating factors listed, and should perhaps have commenced lower down the scale.

[37] Keith J in ***Senilolokula v State*** [2018] FJSC 5; CAV0017.2017 (26 April 2018) urged avoidance of "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."

[38] There are advantages in picking a starting point from the lower or middle range of the tariff ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013), though some judges prefer the lower end.

[39] In ***Koroivuki*** Goundar JA said:

"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] 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 stage. 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."

Totality

[40] At the end of the day, whichever methodology has been used, the sentencing judge, as also the appellate court, will stand back and consider whether the sentence is appropriate for the gravity and circumstances of the crime taking all of the factors into account: ***Senilolokula*** at paragraph [22]:

> *"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."*

[41] The final sentence of 16 years was correct for this case. It has been remarked on before by this court that too frequently sentences are handed down with one year's difference in the non-parole period, when 2 years would have been more purposeful ***Ratu v State*** [2024] FJSC 10; CAV24.2022 (25 April 2024).

[42] In summary, this case involved a grandfather who had raped not one but two, of his biological granddaughters. He did so for over a period of 13 months. They were aged 13 and 15 years old. It would have been obvious to him that what he did at the time caused them suffering, bleeding and weakening pain. He threatened to kill them with his cane knife. In one instance he used a kitchen knife and tied up the young girl by her hands, ankles and by a cloth to her mouth. On any reckoning this was a shocking abuse of two young girls in

a village setting, a memory not easily erased. Such discounts in sentence, as were proper, he had been accorded. But stern denunciation was a necessary and inevitable outcome.

Result

[43] No error of principle or of law has been established. The grounds fail, and the appeal must be rejected.

Arnold, J

[44] I have read the judgment of Gates J in draft and agree with his conclusions and orders. I take the opportunity, however, to reiterate two points that this court has made previously.

[45] The first is that any deduction for time served should be made at the end of the process, i.e. after identification of what would, without any deduction for time-served, be the appropriate head sentence and the appropriate minimum non-parole period: see ***Sowane v State*** [2016] FJSC 8 at paragraphs [17] - [18] and ***Ratu v State*** [2024] FJSC 10 at paragraphs [36] – [38].

[46] The second is that, in principle, non-parole periods should be set so as to allow a sufficient gap between the non-parole period and the head sentence to encourage the possibility of rehabilitation: see ***Ratu*** (above) at paragraphs [33] – [35]. Particularly where there is a lengthy sentence, a gap of one year will rarely be sufficient.

[47] That said, I agree that at the end of the process, the court should consider whether, overall, the sentence is appropriate to the gravity and circumstances of the offence.

Goddard, J

[48] I am in total agreement with the reasoning and conclusions of the learned Judge.

Orders of the Court:

1. *Special leave refused.*
2. *Petition dismissed.*
3. *Sentence of the High Court affirmed.*

The Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Justice Terence Arnold
JUDGE OF THE SUPREME COURT

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JUDGE OF THE SUPREME COURT

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