IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0034 of 2023
Court of Appeal No. AAU 0065 of 2018

BETWEEN: **GANGA RAM**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Justice Anthony Gates**
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Terence Arnold
Judge of the Supreme Court

Counsel: **The Petitioner in person**
Ms L L Latu for the Respondent

Date of Hearing: **11 October 2024**

Date of Judgment: **30 October 2024**

JUDGMENT

Gates, J

1. I agree with the judgment of Keith J, with its reasoning and orders.

Keith, J

Introduction

2. This is one of a number of cases in the present session of the Supreme Court in which a considerable time elapsed between when the defendant had been interviewed by the police about an offence and the investigation into the offence had been completed, and when his trial eventually got under way. In this case, the lapse of time was almost seven years. To what extent, if at all, did that lapse of time prevent the defendant from getting a fair trial? And even if he still got a fair trial, should the delay be reflected in some tangible way?

3. The petitioner is Ganga Ram. For the sake of convenience, I shall refer to him as Ram. He was charged with two offences of rape. The complainant in each case was the daughter of his cousin. The rape to which the first charge related was alleged to have taken place on 22 January 2011. The rape to which the second charge related was alleged to have taken place between 1 July 2010 and 31 December 2010. The second charge was a representative charge. In other words, the rape to which it related was said to have been one of a number of similar offences which Ram was alleged to have committed against the complainant in the period to which the charge related. Ram's conduct was reported to the police on 30 May 2011. He was interviewed by the police on 8 June 2011, but he was not charged until 1 September 2015.

4. Ram's trial on these two charges began on 21 May 2018 in the High Court at Lautoka before Goundar J. He had pleaded not guilty. At the conclusion of the State's case, the judge acquitted Ram on the first charge. The trial then continued on the second charge. A

majority of the assessors expressed the opinion that Ram was guilty on that charge, and the judge agreed with them. He sentenced Ram to 13 years' imprisonment with a non-parole period of 10 years.

5. Ram appealed to the Court of Appeal against his conviction. The single judge refused to grant him leave to appeal. He renewed his application to the Full Court, which also refused him leave to appeal. Ram now applies to the Supreme Court for leave to appeal against his conviction.

The State's case

6. The State's case was based entirely on the evidence of the complainant. She was 25 years old at the time of the trial, but she was only 17 when the incidents which gave rise to the charges began. She turned 18 in the last month of the period covered by the second charge. I shall refer to her as C in order to preserve her anonymity. She was still at school at the time. Her home was not far from Ram's, and she used to spend a good deal of her time at Ram's home doing household chores in order to pay for her bus fare to school. She claimed that during the period to which the second charge related he forced her to have sexual intercourse with him about six times. He would use force to take off her clothes, lay on top of her and put his penis into her vagina. She could feel it inside her. He threatened to kill her if she told anyone what he was doing. She did not know whether he really meant to carry out that threat, but she did not tell anyone about it. He was much older than her, and she did not want her parents to know what was happening. She eventually realized that she was pregnant. Her neighbour suspected that. She questioned C about it, and C eventually admitted that she was pregnant, and said that Ram was responsible. That was on 22 May 2011. She did not say that she had been raped on 22 January 2011 – the date to which the first charge related – which was why the judge acquitted him on that charge.

7. One feature of C's evidence needs to be mentioned. She made a witness statement on 28 May 2011. In it, she referred to a single occasion on which Ram had raped her. She said

that it had been on 22 January 2011. No doubt that was why the first charge had been brought against him. She did not mention in that statement having been raped on any other occasion. She was asked which part of her evidence was true: had she been raped on 22 January 2011 as she had said in her witness statement, or had she been raped a number of times between July and December 2010 as she had said in her oral testimony? She said that her oral testimony had been true.

8. This line of cross-examination did not tell the whole story. C had made a second witness statement three days later – on 31 May 2011. It was among the disclosures. It was in that witness statement that she referred to the "more than six times" that she had been raped between July and December 2010. That witness statement was not put to her. The impression would therefore have been created that she had never told the police anything about what had happened in 2010. That would have been a false impression, and since the judge was not told anything about the later witness statement that false impression – which was favourable to Ram – was not corrected.

Ram's case

9. Ram gave evidence at the trial. He claimed that C occasionally visited him but never to do any housework. On one occasion in December 2010 she gave him a hug when he was lying on his bed watching a film. He told her off and asked her to go home. Nothing more had happened then, but over the next few weeks she continued to visit him. They eventually developed feelings for each other, and in January 2011 they had sexual intercourse on one occasion. It was entirely consensual. He acknowledged that he was the father of the child she eventually gave birth to, but claimed that the occasion when she had got pregnant was the only time they had had sexual intercourse. They had not had sexual intercourse in 2010 at all, let alone sexual intercourse without her consent.

The judge's judgment

10. The judge found C to have been a convincing witness. He described her as "honest and reliable". The judge did not say that there had been anything in the way in which she had given her evidence for him to doubt what she had said. Nor did he say that he found anything implausible in her account of what she said had happened to her. He was alive to the fact that C had kept going back to Ram's home after he had forced himself on her the first time. He noted that she had said that she had done that because she trusted him. Many people might regard that as surprising, but if the judge did, he did not say so.

The grounds of appeal

11. In his petition to the Supreme Court Ram relies on the grounds of appeal considered by the Court of Appeal. He had drafted those grounds himself. All but one of them can be disposed of relatively briefly. First, he claims that there was no evidence that C had been forced to have sexual intercourse with him. However, the effect of C's evidence was that she had submitted to what he was doing, even though she had not been consenting to it. C was not asked why she had submitted to sexual intercourse. It could have been because of his threat to kill her if she told anyone what he was doing to her. It could have been because she needed the money he was paying her. But whatever the reason, the fact is that it was reasonably open to the judge on the evidence as a whole to conclude that this was a case of submission, rather than consent, to sexual intercourse.

12. Secondly, Ram claims that if he had forced C to have sexual intercourse with him, there would in all likelihood have been some injury which a medical examination on her would have revealed. The absence of any evidence to that effect showed, so he claimed, that any sexual intercourse was consensual. There are a number of answers to that, but the most obvious one is that C only told her neighbour about what she said Ram had been doing to her five months after the last time on which she claimed to have been forced to have sexual intercourse with him. If she had had any injuries as a result of that, they are likely to have disappeared well before any medical examination could have taken place.

13. Thirdly, Ram relies on the fact that it was only after C had discovered that she was pregnant that she complained that he had raped her. Ram claims that she only complained about being raped because she did not want it to be thought that she had got pregnant as a result of consensual sexual intercourse with someone. But whether that was what really had happened was for the assessors and then the judge to decide. The judge must have rejected that possibility, and it cannot be said that it was not reasonably open to him to reach the view he did.

14. Fourthly, Ram argues that if he had been having unwanted sexual intercourse with C for six months or so, the local community would not have supported his candidature for the position of Advisory Counsellor for the district. Again, there are a number of answers to that, but the most obvious one is that it assumes that the local community would have known what had been going on behind the closed doors of Ram's home. That was not suggested at the trial, let alone explored in the evidence.

15. Fifthly, on 11 February 2016 – five months or so after Ram had been charged – C wrote to the Director of Public Prosecutions requesting that the charges against Ram be dropped. In that letter, she said that Ram had never raped her, that it was her father who had reported the matter to the police, and that she was not aware of what details he had told the police. Ram says that this letter was "overlooked" by the State's lawyer at the trial, and had the assessors known about it, the outcome of the case might have been very different.

16. What actually happened puts a different complexion on things. The transcript of the first day of the trial shows that the existence of this letter, and the use to which it could be put at the trial, was discussed with the judge before the trial got under way. The State's lawyer had not seen the letter at that stage, though Ram's lawyer had. He told the judge that he was intending to cross-examine C about it, even though that had not been referred to on the pre-trial conference checklist. The judge said that Ram's counsel could cross-examine C about it, and that the State's counsel could then re-examine her on it. In the event, Ram's counsel did not cross-examine C about it at all, and there was therefore no need for C to be

re-examined about it. That was why the assessors knew nothing about it. There was, of course, no obligation on the State to raise the letter in the trial. The defence knew about it, and it was for them to decide what use to make of it.

17. We have not been told why Ram's counsel did not cross-examine C about it. It is unlikely that he completely forgot about it. After all, it was he who had raised it with the judge in the first place. It is more likely that he decided that it was just too risky to introduce it. For all he knew, C might have said that it was Ram who put her up to write the letter. That would have been very damaging for Ram. The bottom line here is that Ram cannot complain about the non-use of the letter at the trial when it was the defence who decided not to use it.

Delay

18. The one ground of appeal which calls for more mature and careful consideration is the delay. Ram's lawyers did not rely on that delay for any purpose before Ram's trial. No application for a stay of the proceedings was made. It was brought up for the first time as a ground of appeal by Ram in written submissions prepared by him dated 28 January 2019. However, he was subsequently represented by a lawyer in the Legal Aid Commission. She drafted written submissions on Ram's behalf dated 23 October 2020. Those submissions did not rely on the delay. Those were the submissions considered by the single judge. Since they did not suggest that the delay had had an impact on either Ram's conviction or sentence, the issue of delay was not considered by the single judge when he refused Ram leave to appeal against his conviction.

19. By the time Ram's renewed application for leave to appeal against his conviction was heard by the Full Court, he had filed revised submissions. He had drafted them himself. They contained the grounds of appeal which the Full Court considered. They included delay. That ground was considered by the Full Court. Having referred to a number of authorities, it concluded that Ram had

" ... not demonstrated how his defence was prejudiced by the so called delay or how the alleged delay infringed his right to a fair trial or how the criminal proceedings had not been fair to him. There is no abuse of process here and the trial against the appellant had not been oppressive or vexatious."[1]

20. Much of what I have to say about the law on the impact of delay on the fairness of a defendant's trial has been said in one of the other judgments handed down today – *Waganinavatu v The State* – but I repeat here what was said there for ease of reference. I begin by restating what is well-known – that defendants have the right under section 15(1) of the Constitution to a fair trial, as well the right under section 14(2)(g) of the Constitution "to have the trial begin and conclude without unreasonable delay".

21. *Two distinct rights*. The right to a fair trial and the right to be tried "without unreasonable delay" will often overlap, but they are distinct and separate rights. Breach of the right to be tried "without unreasonable delay" will not necessarily amount to a breach of the right to a fair trial. As Wilson J said in the Supreme Court of New Zealand in *R v Williams*:

"... the court may be satisfied that the right to be tried without undue delay has been infringed although the accused has been unable to demonstrate any particular prejudice in defending the charges."[2]

A little later, he said:

"The right to trial without undue delay is directed to the time that elapses between arrest and final disposition, including any appeal, whereas the right to a fair trial comes into play at the time of trial. The two rights overlap, however, where the consequence of undue delay in bringing an accused to trial is that a fair trial cannot be held. Both rights are then breached."[3]

---

[1] [2023] FJCA 66 at para 11 (*per* Prematilaka RJA).
[2] [2009] 2 NZLR 750 at para 9. The right to be tried "without undue delay" is guaranteed by section 25(b) of the New Zealand Bill of Rights Act 1990.
[3] Para 19.

22. *The remedy for breach of these rights*. Where a defendant's right to a fair trial has been infringed by the delay in bringing the trial on, the usual remedy will be a stay of the proceedings. However, where only the defendant's right to be tried "without unreasonable delay" has been infringed, a stay of the proceedings, as Wilson J said in *Williams*, will not be "a mandatory or even a usual remedy".[4] That was explained by Lord Bingham in the Court of Appeal in England in *Attorney-General's Reference (No 2 of 2001)* as follows:

> *"If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or*

[4] Para 18.

entertaining the proceedings but only in failing to procure a hearing within a reasonable time."[5]

23. *The time to apply for a stay*. Where it is said that a defendant cannot have a fair trial – whether because of the delay or for some other reason – the appropriate time for him to apply for a stay of the proceedings is before the trial begins. As I have said, no application for a stay was made on Ram's behalf before his trial. Indeed, the issue of delay was not raised by his lawyers prior to the trial at all. Should Ram nevertheless be allowed to argue after his trial that the delay in bringing him to trial was such that he was denied a fair trial?

24. The question whether, after the trial has taken place, a defendant can challenge his conviction on the ground of the delay in bringing him to trial when he had not previously said that the delay had prevented him from having a fair trial was considered by the Court of Appeal in *Seru v The State*.[6] In that case, both defendants had raised the issue of delay prior to their trial, and the Court of Appeal considered two matters. First, by what route did the Court of Appeal have jurisdiction to treat delay as a ground of appeal, even if the issue of delay had been raised before the trial? Secondly, where the issue of delay had not been raised before the trial, could it subsequently be raised on an appeal against conviction? The Court of Appeal did not express a final answer on either of those questions. What it said was this:

" ... the State did not deny the Court had jurisdiction to consider the argument based on section 29(3). In the absence of argument we do not express a final opinion on the foundation of the jurisdiction, but the possibilities include regarding it as founded on the miscarriage of justice ground under section 23(1)(a) of the Court of Appeal Act 1949; or the rationale may be that section 29(3) expands the statutory grounds of appeal. A leading decision in the Supreme Court of Canada, R v Morin (1992) CR (4th) 1 dealt with a delay

[5] [2004] AC 72 at para 24. The references to "the defendant's Convention right" are references to the right in Art 6(1) of the European Convention on Human Rights to be tried "within a reasonable time".
[6] [2003] FJCA 26.

argument after trial and conviction; although the appellant's contention failed, none of the judgments suggested the argument could not be raised at that stage. Likewise, in R v Coghill [1995] 3 NZLR 651, a full court of the New Zealand Court of Appeal dealt with a delay argument under the corresponding New Zealand legislation, on an appeal after trial. We consider it is open to an appellant to raise the delay issue post trial, certainly in cases where, as here, the point has been taken pre trial, and an appeal against dismissal was lodged and remained extant. To what extent this Court has jurisdiction to entertain such a ground post trial in different circumstances must remain to be decided in cases where that issue arises."

25. The cases of *Morin* and *Coghill* cited in *Seru* were, like *Seru*, cases in which, unlike the present case, the issue of delay was raised prior to the defendants' trial. I have come across only one case prior to the present one in which an appellate court has had to consider the issue of delay when the issue had not been raised prior to the defendant's trial. That case is the decision of the Supreme Court in *Nalawa v The State*.[7] It did not specifically address the question whether a failure to raise the issue of delay prior to the trial prevented it from being raised on appeal. It referred to the judgment of the Court of Appeal which had noted that the case had been adjourned a very large number of times. The Court of Appeal had acknowledged that

"many of the adjournments were simply due to the unavailability at Lautoka of sufficient magistrates to enable matters to be heard in a timely manner. But many of the adjournments were at the request of the appellant after the withdrawal of defence counsel, after the sacking of defence counsel or while the appellant sought legal aid ..."

Although the Supreme Court noted that "not once did he or legal aid solicitors appearing on occasion for him ... complain about delay or breach of his right to be tried within a

[7] [2010] FJSC 2.

reasonable time"[8], it said that it was led "to the inescapable conclusion that the petitioner is the cause of his own problems as far as delay is concerned".[9] Looking at these passages in the round, it looks to me as if the Supreme Court refused leave to appeal, not so much because it had no power to consider an appeal based on delay when delay had not been raised as an issue before the trial, but rather because it was the defendant in that case (or perhaps his lawyers) who had been responsible for much of the delay, and the defendant was therefore the author of his own misfortune.

26. In my view, the failure of Ram or his lawyers to apply for a stay of the proceedings before his trial did not prevent him from raising the issue of delay on his appeal against his conviction. The reason is that in many cases, the adverse impact of the delay on the fairness of the trial may well not become apparent until the trial is already under way. For instance, it may not have been appreciated before the trial began that the memory of a particular witness who it was believed could have given evidence favourable to the defence was as poor as it turned out to be, or that such a witness had become unavailable, whether through death, illness, absence overseas or being unable to be found. And every lawyer knows that unexpected things can emerge in the course of a trial. Perhaps a new issue has arisen, but as a result of the delay witnesses who might have been able to give evidence favourable to the defence on that issue are not available. Other examples can be given, but that is sufficient to make the point. In my opinion, it was open to Ram to argue in the Court of Appeal that there had been a breach of his right to a fair trial and his right to be tried "without reasonable delay", even though the issue of delay had not been raised before his trial. That accords with what the Supreme Court did in *Nalawa*, even though it did not consider the jurisdictional basis for doing so.

27. *The consequences of delay*. A lengthy delay in bringing a defendant to trial has two consequences. The first, of course, is that it could have an adverse impact on the trial itself. I have already touched on that: the unavailability of witnesses, the impact of the delay on

[8] Para 31
[9] Para 32.

their memory, the destruction or loss of relevant documents to name just a few. But there is also the impact of the delay on the defendant. Some delay will be inevitable as both sides prepare for trial, and once they are ready, a judge, a courtroom and court staff will have to be made available, but the longer the delay, the greater the impact of the prosecution on the defendant. If the charges are serious, and the defendant knows that he or she will be going to prison for a long time in the event of conviction, life for them will often stand still. They cannot make plans for the future as they do not know what the future will hold. They may be suspended or dismissed from their employment. Their family life will inevitably be affected. They may still be able to get a fair trial, but that does not mean that they have not been prejudiced in other ways. The anxiety of someone who is awaiting trial and is presumed to be innocent until his guilt has been established at trial should not be underestimated. In addition, the defendant may have been remanded in custody pending his trial or subject to onerous bail conditions. The fact that delay has both these consequences was pithily expressed by Lord Templeman in the Privy Council in *Mungroo v R*:

> *"The right to a fair trial 'within a reasonable time' secures, first, that the accused is not prejudiced in his defence by delay and, secondly, that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum."*[10]

28. *The test for determining breach of these rights*. In *Morin*, Sopinka J in the Supreme Court of Canada said:

> *"The general approach to a determination as to whether the right [to be tried within a reasonable time] has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the*

[10] [1991] 1 WLR 1351 at page 1352. The right to be tried "within a reasonable time" is guaranteed by the Constitution of Mauritius.

cause of delay ... While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. *the length of the delay;*
2. *waiver of time periods;*
3. *the reasons for the delay, including*
   (a) *inherent time requirements of the case,*
   (b) *actions of the accused,*
   (c) *actions of the Crown,*
   (d) *limits on institutional resources, and*
   (e) *other reasons for delay; and*
4. *prejudice to the accused."*[11]

This statement of principle was adopted by the New Zealand Court of Appeal in *Martin v Tauranga District Council*[12] and by the courts of Fiji – by the Court of Appeal in *Mills and ors v The State*[13] and by the Supreme Court in *Nalawa*.

29. Sopinka J made important comments on all of these factors, but he thought that one particular factor needed to be looked at with a degree of realism. That factor was "limits on institutional resources". Very often the system will not be able to accommodate the parties even when they are ready for trial. We live in a world in which resources are limited. On that topic, Sopinka J said:

"How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other

[11] *Morin v The Queen* [1992] 1 SCR 771 at pagers 787d-788a. The right to be tried "within a reasonable time" is guaranteed by section 11(b) of the Canadian Charter of Rights and Freedoms.
[12] [1995] 23 NZLR 419.
[13] [2005] FJCA 6.

government programs compete for the available resources, this consideration cannot be used to render [the right to be tried within a reasonable time] meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishers this obligation from many others that compete for funds with the administration of justice."[14]

30. I gratefully adopt Sopinka J's approach with one reservation. Prejudice to the defendant is obviously of critical importance to whether the delay has resulted in a breach of the defendant's common law right to a fair trial, but it is, I think, less relevant to whether the delay has resulted in a breach of his right to be tried "without unreasonable delay". As Wilson J noted in *Williams*[15], a defendant's right to be tried without undue delay may have been infringed even though the defendant has been unable to demonstrate any particular prejudice in defending the charge.

31. *The application of the test to Ram's case*. With these principles in mind, I turn to the present case. As I have said, Ram was interviewed by the police on 8 June 2011. We were told that the police sent their file to the office of the Director of Public Prosecutions on 9 November 2011 for a decision to be made whether Ram should be charged, and if so, with what. We were not told why it took some five months for the file to be sent to the office of the Director of Public Prosecutions. We were told that the police were then required to carry out further investigations, though we were not told what they were or whether any further investigations were indeed carried out. It may be that none were because when one looks at the disclosures which were served on the defence in 2015 after the case had been transferred to the High Court, none of the witness statements disclosed were dated after 9

[14] At p 795f-j.
[15] *Op cit*, para 54 (*supra*).

November 2011 – with the exception of witness statements setting out Ram's response when he was told in 2015 that he was being charged.

32. We were told that the Director of Public Prosecutions sanctioned the charges on 23 June 2014, more than 2½ years after the file had been received at the office. We were not told why it took so long, save for the further unspecified investigations which the police had been required to carry out. The file was returned the following day to the police for Ram to be charged. However, as I have said, Ram was not charged with the two offences until 1 September 2015. We were not told why it took over 14 months for Ram to be charged after the charging decision had been made.

33. Although Ram was charged with the two offences on 1 September 2015, his trial in the High Court did not begin until 21 May 2018 – about 2½ years later. We have the judge's brief notes of what happened when Ram's case was listed for mention, and we have been provided with a detailed chronology as well. These documents show that the disclosures were ready to be served on Ram's lawyers by 7 December 2015, and his pleas of not guilty were tendered on 21 January 2016. By 24 February 2016 the State had asked for more time to finalise the issues to be discussed at the pre-trial conference. By then six months had elapsed since Ram had been charged, and the pace of the litigation up to then had not been unreasonable.

34. So why did it then take over two years for the case to come to trial? It could have been because of a delay in holding the pre-trial conference, though we were not told when it took place. It could have been because the agreed facts had not been filed by 20 February 2017, even though the need to agree them had been discussed in court on 21 January 2016. That is at first blush very surprising. The agreed facts which were eventually agreed covered C's name and date of birth, where her home was at the relevant time and the fact that she was living with her father, and the dates on which Ram was interviewed and charged. Without wishing to be too discourteous, a 12 year old would have been able to agree these

facts in five minutes rather than the 13 months it actually took. Alternatively, the delay could have been because of the letter which C wrote asking for the charges against Ram to be dropped. But whatever was the cause of the delay, it resulted in the case not being ready for trial until 7 July 2017, which was when the date for the trial – 21 May 2018 – was fixed.

35. A lapse of time of almost seven years from the interview of the defendant to trial would not be permitted in more sophisticated jurisdictions. A delay of this kind – especially in a relatively straightforward case like this – simply would not happen. But it would be wrong to look at Fiji through the same prism. Although all jurisdictions have their own resource limitations, Fiji does not have the resources – whether in terms of judicial manpower, experienced prosecutors, courtrooms and funding – comparable to, say, Australia, New Zealand or the United Kingdom. That should not be overlooked when you compare the lapse of time in this case with delay which is treated as unacceptable elsewhere.

36. In the light of all the circumstances (though leaving aside for the present whether Ram was prejudiced in presenting his defence properly at the trial), the lapse of time in this case – with so much of it unexplained – amounted in my opinion to a violation of Ram's right to be tried without unreasonable delay. That should have been reflected in an appropriate reduction in his sentence. As it turned out, that is exactly what happened. Although the trial judge did not have Ram's constitutional right to be tried "without unreasonable delay" in mind, he made a reduction in what would otherwise have been the appropriate sentence. After referring to the three weeks during which Ram had been remanded in custody pending his trial, the judge said:

"There is also a pre-charge delay of 4 years by the State in charging you and a [systemic] post-charge delay of about 3 years in trying you. Some concession is made to reflect delay."[16]

37. Unfortunately, we do not know what discount the judge gave for the delay. He did not say what his starting point would have been but for the delay. But we can, I think, make an educated guess. He said that the current tariff for rape of an adult was between 7 and 15 years' imprisonment. He added that the aggravating factors in the case were "overwhelming": C's age, the breach of trust, the pregnancy, the thwarting of her ambitions for the future, the disparity in their ages, and the cultural stigma which might prevent her from finding a loving and permanent relationship. He may well have taken as his starting point somewhere close to the top end of the tariff. Doing the best I can, I propose to assume that the judge's starting point before factoring the delay into the equation would have been 14 years' imprisonment. On that assumption, he would have discounted Ram's sentence by only one year for the delay.

38. In my opinion, that would have been too little. I think that the appropriate discount, bearing in mind how long elapsed before Ram's trial got under way, would have been two years. So although Ram has not sought leave to appeal against sentence, reducing his sentence by a further year is the only way properly to reflect the violation of his constitutional right to have been tried "without unreasonable delay".

39. But what about Ram's right to a fair trial? Was the delay such that he did not have a fair trial? It is here, of course, that the question of prejudice is all important. We asked Ram how the delay had had an adverse impact on the fairness of his trial. To the extent that he understood what he was being asked, he was unable to point to anything specific. As he is not represented, I have tried to look at things from his perspective, but I have not been able to think of anything which could be said to have caused the delay to have had an adverse

[16] Page 38 of the Record of the High Court, para 6.

impact on the fairness of his trial. It follows that I do not think that Ram's right to a fair trial has been breached.

Conclusion

40. For these reasons, I would give Ram leave to appeal against his conviction on the basis that his ground of appeal relating to delay involves a question of general legal importance. In accordance with the Supreme Court's usual practice, I would treat the hearing of his application for leave to appeal against his conviction as the hearing of the appeal, but I would dismiss his appeal against conviction. I would allow him to treat his application for leave to appeal against his conviction as also an application for leave to appeal against his sentence. I would give him leave to appeal against his sentence on the basis that a substantial and grave injustice might occur if he were not permitted to contend that an insufficient discount was given for the delay in bringing him to trial. I would allow his appeal against sentence, I would quash the sentence of 13 years' imprisonment with a non-parole period of 10 years, and I would substitute for it a sentence of 12 years' imprisonment with a non-parole period of 9 years.

Arnold, J:

41. I have read the judgment of Keith J in draft and agree with its reasoning and with the orders proposed.

Orders:

(1) Leave to appeal against conviction granted.

(2) The petitioner's application for leave to appeal against his conviction be treated as also an application for leave to appeal against his sentence.

(3) Leave to appeal against sentence granted.

(4) Appeal against conviction dismissed.

(5) Appeal against sentence allowed.

(6) Sentence of 13 years' imprisonment with a non-parole period of 10 years quashed, and a sentence of 12 years' imprisonment with a non-parole period of 9 years substituted.

The Hon. Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Terence Arnold
Judge of the Supreme Court