IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0022 of 2019
Criminal Appeal No. AAU 0090 of 2014

BETWEEN: **ISEI KORODRAU**

Petitioner

AND: **THE STATE**

Respondent

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

The Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel: **Petitioner in person**

Mr Vosawale (Office of DPP) for the Respondent

Date of Hearing: **03 April, 2023**

Date of Judgement: **27 April, 2023**

JUDGEMENT

Gates, J

[1] I have had the advantage of reading the draft judgment of Mataitoga J. I agree with it and with its reasons and conclusions.

Lokur, J

[2] I agree with the well written and comprehensive draft judgment.

Mataitoga, J

Introduction

[3] The petitioner in this case seeks the special leave of the Supreme Court to appeal against the sentence that was revised by the Court of Appeal at an appeal hearing on 12 September 2019. The Court of Appeal in its judgment dated 3 October 2019 found favor with both grounds submitted by the petitioner (appellant) challenging the sentences that were imposed by the trial Judge in the High Court.

[4] In the Court of Appeal, appeal against conviction was dismissed. However, the appeal against sentence was allowed. The sentence of 17 years with a non-parole period of 16 years imposed in the High Court was quashed and 15 years imprisonment with a non-parole period of 13 years was imposed.

High Court

[5] The Petitioner was charged with the following offences in the High Court at Suva:

i) one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act;
ii) one count of theft contrary to section 219(1) of Crimes Act
iii) One count of rape contrary to section 207(1) and 2 (a) of the Crimes Act.

[6] After trial, and following a unanimous decision of the assessors, the petitioner was convicted on all three charges on 10 July 2014. The trial Judge sentenced the applicant to 3 years for count 1 [aggravated burglary], 3 years for count 2 [theft] and 17 years for count

3 [Rape] and he directed that the sentences to be served concurrently, with non-parole period of 16 years.

[7] The petitioner initially filed an appeal against conviction and sentence in the Court of Appeal on 15 July 2015.

The Court of Appeal

[8] On 15 July 2015, the petitioner lodged an appeal against his conviction and sentence in the Court of Appeal. In the leave to appeal application before a single Judge of the Court of Appeal, the grounds of appeal against conviction set out in the amended grounds of appeal were rejected but leave to appeal against sentence was allowed. Both the appellant and State Counsel filed written submissions before the single Judge.

[9] The Court of Appeal after a prolonged period during which the petitioner's grounds of appeal changed a few times, with new grounds appearing on a piecemeal basis including an application to lead fresh evidence. This maneuvering on the part of the petitioner led the Court state as follows in paragraph 10:

> *"The appellate courts have had to deal with this unhealthy practice before and frowned upon them in no uncertain terms. In **Tuwai v State** CAV001/2015: 26 August 2016 [2016] FJSC 35, the Supreme Court observed:*
>
> *'82. It is improper that litigants be allowed to argue their cases on piecemeal basis. Once a set of appeal grounds are unsuccessful, they raise another set to test whether that will hold some substance. If stringent rules are not applied where necessary there will never be an end to litigation and there can be huge disruptions to case management.*
>
> *83. The Court's time is not only for a particular litigant. Access to justice is meant for all the users of the Court and these are allowed to come to court as and when they think of a point that may arguable, I say without hesitation, that a lot of the court's resources are going to be shamefully wasted."*

[10] On 27 April 2018, the single Judge refused the 8 grounds against conviction argued by the appellant, but granted leave to appeal against sentence on the two grounds that were submitted.

[11] Before the Full Court of Appeal, the petitioner appealed against sentence only. After careful considerations of the grounds of appeal submitted by the appellant and relevant case law, the court allowed the appeal against sentence. The sentence of 17 years with non-parole of 16 years imposed by the trial judge was quashed and 15 years with non-parole period of 13 years was imposed.

Summary of Facts

[12] Before dealing with the grounds of appeal against sentence it is important to set out the relevant facts briefly. The petitioner was a 19-year-old unemployed youth from a village in Tailevu and was doing subsistence farming for his living. On 10 February 2011, he left his village and came to Suva to visit some friends in Raiwaqa. In Raiwaqa, he met his friends, and in the afternoon on 10 February 2011, they began to consume liquor and continued it late into the night. In the early hours of 11 February 2011, the appellant left his friends and started wandering around nearby streets in Raiwaqa and Nailuva Road.

[13] The complainant was 29 years old expatriate, working in a managerial position, in one of the higher educational institutes in Fiji. She was fast asleep in her apartment in Suva. Sometime after 01a.m. on the 11th morning, the appellant entered the complainant's apartment. He saw the complainant's apartment's front slide door open, but the burglar grill door was closed and locked. The burglar grill door key was on a coffee table near the front slide door. The appellant 'fished' for the key by using a mop stick. He then opened the burglar grill door, and went inside the complainant's apartment. The accused was looking for money. The complainant, at the time, was fast asleep alone in her bedroom. The accused took a kitchen knife from the complainant's kitchen, went to her bedroom and forcibly woke her up by putting the kitchen knife to her neck. When she tried to scream, he covered her mouth and warned her if she screams, he would kill her.

[14] He demanded money from the complainant and she gave him various currencies. He also took the complainant's properties itemized in the second count of the Information. He later dragged her to the sitting room, and pinned her to the floor by holding her neck with his hand. She decided not to struggle, and the appellant forcefully took her back to the bedroom. In the bedroom he demanded sex from the complainant while still holding the

knife to her neck. Under duress the complainant obliged and the appellant had sexual intercourse with her twice and ejaculated inside her. After that the appellant left the complainant's apartment in the early morning of 11 February 2011.

[15] The matter was reported to police later and an investigation was carried out. The complainant was medically examined approximately 8 to 8 ½ hours after the alleged rape at CWM Hospital. Medical evidence reveals her injuries as *'... Throat - tender; Left Arm – 1 cm laceration along inner aspect, dried clot; vagina – slight abrasion on labia minora; white liquid in vaginal vault..'* And *'... Recent sexual activity...'*. It would appear that the medical report confirms the complainant's version of events. The appellant was arrested by police at Tailevu on 23 February 2011. He was cautioned on 24 and 25 February 2011 and was formally charged for the offences on 25 February 2011.

Jurisdiction of the Supreme Court

[16] Section 98(3)(b) of the Constitution of the Republic of Fiji sets out the jurisdiction of this Court and provides:

> *"The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by a written law, to hear and determine appeals from all final judgements of the Court of Appeal."*

[17] Further, section 98(4) of the Constitution stipulates that:

> *"An appeal may not be brought before the Supreme Court from a final judgement of the Court of Appeal unless the Supreme Court grants leave to appeal."*

[18] The important point to make here is that special leave stands at the gateway to final appellate consideration. To engage this Courts appellate jurisdiction as contemplated in section 98(5), one must first be granted special leave.

[19] This Court is directed to have regard to the criteria set out in section 7(2) of the Supreme Court Act 2016 which provides:

> *In relation to a criminal matter, the Supreme Court must not grant leave to appeal unless*

a) *a question of general legal importance,*

b) *a substantial question affecting the administration of criminal justice,*

c) *a substantial and grave injustice may otherwise occur*

[17] The above are the threshold criteria which MUST be satisfied by the petitioner before leave may be granted. Section 7(2) requires that one or more of the criteria set out therein is made out before special leave is granted.

[18] Special leave applications act as a filtering mechanism to ensure that the Supreme Court expends its limited judicial resources determining only the most significant legal questions.

[19] Section 7(2)(a) of the Supreme Court Act 2016 is directed to the court's law-making function. The grant of special leave in relation to such questions of law enables the court to clarify the law by formulating the correct legal principle. The formulation of the correct principle to clarify the law is the decisive consideration in the grant of special leave. In this way, a question of general legal importance requires this Court to be satisfied that there is a gap in its jurisprudence that requires filling. It is not sufficient that mere error be demonstrated or that a contestable point is raised. It must be established that if the error is left to stand, a state of unsatisfactory incoherence in law will exist.

[20] In the case of **Livia Lila Matalulu and Anor v The Director of Public Prosecutions** [2003] 4 LRC 712, their Lordships articulated the role of the Supreme Court in applications for special leave to appeal matters in the following way:

> *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The grant of special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave justice."*

[21] While this Court is not bound by what is said in the decisions of foreign commonwealth courts, the general common law principles adopted in the consideration of special leave applications in Courts of similar jurisdictions are instructive.

[22] In **Liberato v R** (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792 (HCA) the High Court of Australia held, it not being a court of criminal appeal, will not grant special leave to appeal in criminal cases unless some point of general importance is involved which, if wrongly decided, might seriously interfere with the administration of criminal justice. It would not accord with that practice to grant special leave to appeal in a case where no question of law is involved and the court is merely asked to substitute for the view taken by an appellate court below a different view of the evidence and the summing up.

[23] Section 7(2)(b) and (c) of the Supreme Court Act 2016 ordinarily applies to two categories of cases, one substantive, the other procedural. Both can be said to fall within the class of miscarriages of justice. Special leave may be granted in the categories to which subsections (b) and (c) applies because the judgment under challenge is inconsistent with the proper administration of justice.

[24] It is worth mentioning here that in dealing with applications for special leave to appeal in criminal cases, the High Court of Australia first adopted the principle laid down by the Privy Council in **Re Dillet** (1887) 12 App Case 459 at 467, that special leave to appeal will not be granted unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave, injustice has been done.

[25] In **Morris v R** (1987) 163 CLR 454; 74 ALR 161 (HCA) Mason CJ said at CLR 456; ALR 162:

> *"The principles which guide this court in considering applications for special leave to appeal in criminal cases are stated in the reasons for judgment prepared by Dawson J [at ALR 176 and CLR 597]. His Honour's examination of the cases reveals that as a matter of long-standing tradition, in conformity with the concept of special leave to appeal, this court has steadfastly refused to grant an application when all*

that is involved is a question of fact. In this respect the court draws no distinction between civil and criminal cases or between cases tried by a judge and those tried by a jury, though appellate courts are more averse to usurping the function of a jury than they are to interfering with the findings of fact made by a primary judge."

[26] In *White v R* (1962) 107 CLR 174; 36 ALJR 209 (HCA) it was held that, prima facie, special leave to appeal will not be granted by the High Court of Australia unless a case involves some point of law of general application and therefore of importance. Where the matter involved is a sentence, the High Court of Australia will not intervene unless there appears to have been a gross violation of the principles which ought to guide discretion in imposing sentences.

Grounds of Appeal

[27] The petitioner's grounds of appeal as set out in his submission to the Supreme Court dated 10 October 2019 to support his Leave application are as follows:

i) The court of appeal erred in law and in fact, in not giving cogent or justifiable reasons why the final term falls at the higher or top end of the tariff. He cites para 122 of the **Koroivuki v The State**; AAU0018 of 2010; [2013] FCA 15 to support his claim.

ii) The court erred in law and fact in failing to consider that the trial judge had considered aggravating factors for all three counts together and in the process had counted the elements of the offence of aggravated burglary and theft as aggravating factors for adding four years for the offence of rape. That some aggravating factors have been repeated possibly amounting to double counting.

[28] In the Supreme Court for the hearing of his petition for special leave, the petitioner submitted to the court what he termed 'speaking notes' and in it is the following additional ground:

"It is respectfully submitted that the trial Judge used aggravating factors to select the 15 years high starting point and also count the element of

aggravating burglary and theft as aggravating factors in adding 4 years amounting to total of 19 years.

When the Court of Appeal dealt the sentence the judgment of the court of appeal does not speak or correct the high starting point nor correct the double counting. But the 15 years new sentence tell us that the 15 years starting point is still stand, the double counting is still stand.:"

[29] The petitioner mentioned section 7(2) of the Supreme Court Act in his 23 February 2023 submission but advances no arguments to show that the hurdles which is a pre-requisite for his petition to be heard by the Supreme Court, is addressed. Instead, his three grounds of appeal in the Supreme Court were repeat submissions that were advanced in the Court of Appeal.

[30] The petitioner has made no reference to the Court of Appeal reasoning for allowing his appeal against sentence and the reasons for substituting a new sentence, which he is seeking leave to appeal against.

[31] At the hearing of the petition, the petitioner was not able to explain, why the reasons set out in the Court of Appeal judgement do not address his complaint against sentence. Instead, his submission is wholly about getting the 4 years instead of the 2 years in the computation of the reduction in the sentence, that the Court accepted in the revised sentence. When asked to explain how this submission is relevant to anyone of the three requirements of section 7(2) of the Supreme Court Act, there was no explanation provided.

Assessment of the Court

[32] Turning to consider the first ground submitted by the petitioner, which was

'The court of appeal erred in law and in fact, in not giving cogent or justifiable reasons why the final term falls at the higher or top end of the tariff. He cites para 122 of the **Koroivuki v The State**; AAU0018 of 2010; [2013] FCA 15 to support his claim.

[33] The Court of Appeal addressed this ground of appeal when it was raised there. In paragraph 123 of its Judgement the court observed:

> *"The trial judge had not stated why he picked the starting point at the highest tariff point. Neither had he explained why the head sentence fell outside the tariff for adult rape. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle*
>
> *(ii) Allowed extraneous or irrelevant facts to guide or affect him*
>
> *(iii) Mistook facts*
>
> *(iv) Failed to take into account some relevant considerations*
>
> *(Vide **Naisua v State** CAV0010 of 2013; 20 November 2013 [2013] FJSC 14 following **House v The King** [1936] HCA 40; (1936)55 CLR 499 as adopted in **Bae v State** AAU0015 of 1998: 26 February 1999 [1999] FJCA 21."*

[34] The Court of Appeal clearly addressed this issue of the head sentence of 17 years being too high due to the trial judge considering irrelevant factors. In para 127 of the judgement the Court stated:

> *"I have examined all the material available and I take the view that the head sentence should be very substantial. So should the non-parole period be. However, the period of non-parole (i) should not be so close to head sentence as to deny or discourage the possibility of rehabilitation (ii) nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent and it should not be at or less than two thirds of the head sentence in light of **Bogidrau** guidelines (incorporating **Tora** and **Raogo**).'*
>
> *My observations on the sentence and non-parole period are given later in the judgement. **The head sentence of 17 years for the rape conviction was excessive on account of the sentencing Judge considering irrelevant matters.**"*

[35] The petitioner was asked during the hearing of his petition for special leave, to state how the variation he seeks for his sentence which the Court of Appeal had granted when it was raised before it would satisfy the either of the three requirements set out in section 7(2) of the Supreme Court Act. He was not able to provide any comment.

[36] This ground of appeal must fail because it does not meet the threshold in stated in section 7(2) of the Supreme Court Act 2016

[37] The petitioners second ground of appeal set out in his written submission filed on 10 July 2019 and the so called third ground that came before the court by way of speaking notes on the day of the hearing of his petition raises the same point, namely, the issue of double counting of the aggravating factors were not properly addressed by the Court of Appeal. To examine the petitioner's claim, we need to review how the court addressed this issue.

[38] The Court of Appeal having stated the applicable case law, went on to address the main issue in this petition for special leave, at paragraph 121 of its Judgement it states:

> *"It appears that the High Court Judge has started at the highest point of 15 years and considered aggravating factors for all three counts in adding 4 years in the process counted elements of the offences of aggravated burglary and theft as aggravating factors for adding 4 years for the offence of rape. Further, some aggravating factors have been repeated possibly amounting to double counting. There is no evidence that the trial Judge has given due consideration to the* ***Bogidrau*** *guidelines and the provision of section 4 of the Sentencing and Penalties Act."*

[39] The outcome of this review by the Court of Appeal provided the necessary clarity of the applicable law and how it applied it to the relevant facts in this case. The issue of double counting of the aggravated factors on count 1 [aggravated burglary] and count 2 [theft] when setting the head sentence for count 3 [rape] was addressed and decided in the petitioner's favor.

[40] However, the petitioner is fixed on the idea that the 4 years for aggravating factor was too high and that it should instead be 2 years. He provided no basis for this position.

[41] In the circumstances aforementioned, I am of the view that it cannot be said that the exercise of the Court of Appeal's discretion in clarifying and applying the sentencing principles imposed, amounted to a blatant violation of the principles which guide its discretion in imposing sentences. The second and third grounds advanced by the Petitioner does not meet any of the three threshold requirements set out in section 7(2)(a), (b) and (c). As such, special leave to appeal on the second and third ground of appeal is refused.

Conclusion

[42] Having carefully considered the grounds of appeal submitted by the petitioner in support of his petition for special leave of the Supreme Court to appeal against sentence substituted by the Court of Appeal, I am satisfied that the Petitioner has failed to meet the threshold criteria set out in section 7(2) of the Supreme Court Act 2016 for the grant of special leave.

[43] In all the circumstances, the application for special leave a refused.

Orders

[44] Application for special leave is dismissed.

[45] Judgement of the Court of Appeal is upheld.

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

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