

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 15 of 2024

BETWEEN : **GREGORY PRAKASH**

AND : **STATE**

Counsel : **Mr T Varinava for the Appellant**
Ms S Bibi for the Respondent

Hearing : **3 October 2024**

Judgment : **31 October 2024,**

JUDGMENT

- [1] In my decision of 29 August 2024, I granted Mr. Prakash's application for an enlargement of time to file his appeal.¹
- [2] Mr Prakash appeals from his sentence of 17 October 2023 having pleaded guilty to the offences of criminal trespass and attempt to commit rape. Mr. Prakash was sentenced to imprisonment for 3 years 7 months and 2 weeks, with a non-parole period of 3 years and 1 month. I found no merit with Mr Prakash's appeal against the length of his head sentence but accepted that there was sufficient merit with the challenge to the non-parole period to grant the enlargement of time. The particular concern that I had with the non-parole period was that the learned Magistrate imposed the maximum non-parole period permissible, being 6 months less than the head sentence.²

¹ *Prakash v State* [2024] HAA15.2024 (29 August 2024).

² See s 18(4) of the Sentencing and Penalties Act 2009.

- [3] The written submissions filed for Mr Prakash in support of his appeal address the non-parole period fixed by the learned Magistrate.³ Mr Prakash argues that the learned Magistrate erred in fixing the maximum non-parole period permissible under s 18 of the Sentencing and Penalties Act. He points to two reasons. Firstly, relying on the Court of Appeal decision of *Wabale v State* [2024] FJCA 50 (11 March 2024) he argues that the courts place considerable emphasis on rehabilitation when sentencing an offender and that by setting the non-parole period so close to the head sentence the learned Magistrate was ‘discouraging any chance of rehabilitation’.⁴ Secondly, the learned Magistrate allegedly erred when he stated that Mr. Prakash had a previous sexual offence conviction - this formed the basis, in part, for the non-parole period fixed by the learned Magistrate.
- [4] The State argues that the non-parole period is reasonable and justified.

Decision

- [5] Mr Prakash pleaded guilty to trespassing onto a neighbour’s property in order to attempt to commit rape. He was only thwarted by the resistance of the victim and the diligence of a neighbor. His actions were reprehensible and deserve condemnation by the courts. It was a frightening experience for the victim and, sadly, one that is, no doubt, all too common in the community as the sexual offending figures would suggest. The learned Magistrate’s head sentence properly reflected the seriousness of Mr Prakash’s offending.
- [6] The learned Magistrate’s decision to fix the maximum non-parole period permitted in law reduces Mr Prakash’s opportunity for rehabilitation but does not remove it. Having taken the maximum non-parole period, it was, however, necessary for the learned Magistrate to provide reasons. As the Court of Appeal noted in *Wabale v State* (supra) at [11]:

Corrections Service (Amendment) Act 2019 has left the first part of the observations by Gates, J in Timo (Timo v State CAV0022 of 2018:30 August 2019 [2019] FJSC 22) that judicial officers need to justify the imposition of non-parole periods close to the head sentence.

³ See Submissions for Appellant dated 20 September 2024.

⁴ Para 3.2 of Appellant’s written submissions.

- [7] The learned Magistrate provided the following reasons to justify the non-parole period:

43. The Court notes you have previous sexual offence conviction of Indecently Annoying Person within the last 10 years and you have not learnt your lesson.

44. The message must go out to members of the community and to lascivious minded people like you who think of committing similar offences by exploiting others in a bid to satisfy their own deranged sexual desires, that they will get no mercy from the Court.

- [8] Mr Prakash takes issue with the suggestion he has a previous sexual offence conviction. He has supplied a copy of the Sentence for his previous conviction of Indecently Annoying a Person. The offence in question pertains to s 213(1)(a) of the Crimes Act 2009. The provision is found under Part 12B for Sexual Offences. The provision provides that a person commits an offence who, intending to insult the modesty of a person, utters any word intending that such word shall be heard by the other person. According to the Sentence dated 22 July 2016, Mr Prakash pleaded guilty to the offence – he was also charged with resisting arrest and damaging property. According to the Summary of Facts Mr Prakash was involved in a domestic incident. A male police officer attended the scene and when he arrived Mr Prakash ‘started swearing at [the police officer] saying ‘Tum Konchi’ meaning ‘who are you’ and also uttered the words ‘maichod’, meaning ‘mother fucker’ which annoyed [the police officer]’. For my part, I struggle to see how the words, in the context of which they were said, could be construed as intending to insult the modesty of the police officer. Mr Prakash was simply swearing at the officer. In my view, the summary of facts fall short of satisfying the elements of s 213(1)(a).

- [9] As such, I am satisfied that Mr Prakash did not have a history of sexual offending when sentenced in the present matter. For this reason, the learned Magistrate erred in placing reliance on previous sexual offending to justify the non-parole period.

- [10] Nevertheless, the learned Magistrate was justified in describing Mr Prakash’s present offending as ‘lascivious minded...committing similar offences by exploiting others in a bid to satisfy their own deranged sexual desires’. Deterrence figures strongly with respect to fixing a non-parole period.

- [11] What then to make of the learned Magistrate's error for part of his justification for the non-parole period? I have come to the conclusion that the error has unfairly impacted on the non-parole period fixed by the learned Magistrate. I have no doubt that the learned Magistrate will have been influenced by his incorrect understanding that Mr Prakash had a history of sexual offending. I have, therefore, decided to set aside the learned Magistrate's non-parole period and substitute the same with a determination by this Court.
- [12] I take into account that if no non-parole period was imposed then Mr Prakash would be eligible, with good behavior, to a one third reduction. His initial release date would in such circumstances occur after serving 2 years and 5 months (67% of his head sentence). The non-parole period imposed by the learned Magistrate was 3 years and 1 month (about 86% of his head sentence). Mr Prakash had no previous convictions for sexual offending. At aged 39 years, he had, largely, an unblemished history - the offending in 2016 being somewhat isolated and, by all accounts, out of character. He is a good candidate for rehabilitation. His non-parole period should reflect this. In all the circumstances and giving effect to the learned Magistrate's proper emphasis on deterrence, I am satisfied that a reasonable non-parole period is 2 years and 9 months.

Orders

[13] My orders are as follows:

- i. Mr Prakash's appeal against his sentence of 17 October 2023 is allowed.
- ii. I affirm the learned Magistrate's head sentence of 43 months and 2 weeks (3 years, 7 months and 2 weeks) for the offence of attempt to commit rape and 4 months imprisonment for the offence of criminal trespass to be served concurrently.
- iii. The learned Magistrate's sentence is partially quashed in respect to the non-parole period of 3 years and 1 month. I substitute my own sentence for Mr Prakash in this regard. His non-parole period is 2 years and 9 months effective from the date of his sentence on 17 October 2023.

- iv. Thirty (30) days to appeal to the Court of Appeal.



D. K. L. Tuiqereqere
JUDGE



Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent