IN THE SUPREME COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

APPEAL CASE NO: CAV 0038/2015
[On Appeal from the Court of Appeal No: AAU62/2006]

BETWEEN: **APAKUKI SOWANE**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Chief Justice Anthony Gates**
President of the Supreme Court
The Hon. Mr. Justice Sathyaa Hettige PC
Judge of the Supreme Court
The Hon Mr. Justice Buwaneka Aluwihare PC
Judge of the Supreme Court

Counsel: **Petitioner in person**
Mr. M. Korovou for the Respondent

Date of Hearing: **Friday 8th April 2016**

Date of Judgment: **Thursday 21st April 2016**

JUDGMENT

Gates P

[1] This petition concerns the working of the provision in the Sentencing and Penalties Decree 2009 [Section 24] in which the sentencing court, unless it orders otherwise, is to regard time already spent in custody by the offender as a period of imprisonment already **served** by the offender.

[2] The wording of section 24 is as follows:

> "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."

[3] The matter is raised in this court because of the way in which the Court of Appeal, upon substituting manslaughter for murder, then re-sentenced the Petitioner. The re-sentencing orders have given rise to some ambiguity.

[4] The Petitioner had been found guilty in the High Court of murder and robbery with violence, both convictions under the Penal Code, and his co-Accused of manslaughter and robbery with violence. On 27th October 2006 the Petitioner was sentenced to life imprisonment for murder and 9 years for robbery with violence. Both sentences were to be served concurrently. The Petitioner appealed against his conviction to the Court of Appeal.

[5] The charges arose out of a robbery carried out by the two Accused at a small house in Nasole near Suva. Inside the house was a middle aged female victim. She was surprised by the Petitioner, who bound her up, after knocking her to the ground. She was tied around the legs and again around the neck and face with cloth, and a pillow kept over her nose, mouth and face. The Petitioner ransacked the house for money or jewellery whilst the co-Accused was told to guard the victim and to keep her from shouting out. The fixing of the cloth and the pillow led to her death whilst they were still inside the house.

[6] The doctor performing the autopsy concluded in his evidence that the cause of death was:

> "**Asphyxiation by manual strangulation**. Strangulation, food in air passage and smothering. Exclude and conclude as to what appropriate cause of death. Indicates struggle at time of smothering and marks on neck. **More** ... **strangulation**."

[7] A majority of the court found that had the trial judge directed on certain matters which were omitted in his summing up the assessors were likely to have returned a

verdict of "not guilty of murder but guilty of manslaughter." Accordingly the conviction for murder was quashed and a conviction for manslaughter substituted.

[8] Following the reduction of the charge the majority of the Court re-fixed the sentence. Anthony Fernando J said:

> "[32] In passing sentence there must be a strong message that the Court and the community denounces the commission of offences involving violence by home invasion, not only to deter offenders from committing offences of this nature but to protect the community from such offenders. I have taken into consideration the Appellant's position that it was not his intention to cause the death of the deceased and that no sooner he realized that the deceased may have been mortally injured he tried to resuscitate her. The Appellant's position that he did not intent to cause the death of the deceased finds support from the fact that both he and his co-accused went into the house unarmed and that the Appellant had not used any weapon when he attacked the deceased. I have also taken into consideration that the Appellant had been 23 years old at the time of the commission of the offence. Taking the above aggravating and mitigating factors into consideration I substitute for the sentence passed by the Learned Trial Judge, a sentence of 12 years imprisonment with a non-parole period of 10 years which I believe will meet the ends of justice. The period the Appellant has spent in incarceration shall be counted against the sentence." [emphasis added]

[9] The last sentence of this paragraph appeared to have been written to provide guidance to the Corrections Department on what it should do in approaching the 12 year head sentence, and on the need to deduct the time spent in incarceration from that head sentence.

[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."

[11] By what methodology is that to be done? In the past courts have commenced that process by fixing a sentence on a range approved by decisions of the courts, usually

with the authority of one of the appellate courts. The sentencing judicial officer proceeds to give some increase of sentence for specified aggravating factors, and some discount for approved mitigating factors. Within mitigating factors is often included the period spent on remand by the offender in custody awaiting his trial. If this is done, the final term of imprisonment imposed could sometimes fall well below the normal tariff for such offending.

[12] Alternatively the sentencing court could carry out the calculation by the above method, and initially without regard to the period spent in custody, state the sentence for the particular offending. Secondly, the court could go on to set out the actual sentence to be served, after deducting the period of prior custody referred to in section 24. Such a judgment would state what the court's sentence was for the gravity of the offending, and at the same time – by the court's order pursuant to section 24 – set out and hand down the effective sentence that must be served, prior to the consideration of any eligibility for parole, a matter not of sentence but of administrative action within the jurisdiction of the Corrections Department.

[13] At first blush, the petition appeared to be challenging the Correction Department's interpretation of the Court of Appeal's sentence. If it were, the remedy for an inmate would be one for judicial review, for there was no dispute with the order of the Court of Appeal, only with how it was administered by Corrections.

[14] However, the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. 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."

[15] For this reason there is a question raised which qualifies for special leave as a substantial question of principle affecting the administration of criminal justice [section 7(2)(b) Supreme Court Act].

[16] Uniformity of approach to sentencing procedure is important. Whilst both methods may serve the spirit of the Decree, nonetheless a preferred procedure must be decided upon.

[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.

Conclusion

[19] In the result:

Orders of the Court

1. Special leave to appeal is granted.

2. The appeal is partially allowed to the extent that –

(a) The sentence imposed by the Court of Appeal for manslaughter of 12 years with a non-parole period of 10 years is confirmed.

(b) Considering the time spent in custody awaiting trial, the remaining period to be served is to be:

Head Sentence	:	10 years 8 months
Non-parole period	:	8 years 8 months

Hettige J

I concur with the judgment of Gates P and agree with the reasons given and orders proposed.

Aluwihare J

I also concur with the judgment of Gates P. I agree with the reasoning of the judgment and with the orders proposed.

.....

Hon. Justice Anthony Gates
President of the Supreme Court

SUPREME COURT OF FIJI
SUVA

.....

Hon. Justice Sathyaa Hettige PC
Justice of the Supreme Court

.....

Hon. Justice Buwaneka Aluwihare PC
Justice of the Supreme Court

Solicitors for the Petitioner: In Person
Solicitors for the Respondent: Office of the Director of Public Prosecutions

uln