IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Criminal Petition No. CAV 0007 of 2019
[On Appeal from the Fiji Court of Appeal
Criminal Appeal No. AAU 0146 of 2015]

BETWEEN : **VISHWA NADAN**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel : **Mr. V. Chandra for the Petitioner**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **18 October 2019**

Date of Judgment : **31 October 2019**

JUDGMENT

Marsoof J:

[1] I have read in draft the judgment of Keith J and I would respectfully agree with his reasoning and conclusions. I also agree with the orders proposed by him.

Ekanayake J:

[2] I am in agreement with the judgment of Keith J and also with his reasoning, conclusions and proposed orders.

Keith J:

Introduction

[3] This case raises a short but interesting point about the function of the High Court when sentencing an offender who was convicted in the magistrates' court but was transferred to the High Court for sentencing. The relevant statutory provision provides that when that happens, the High Court has to "enquire into the circumstances of the case" before sentencing the offender as if he had been convicted by the High Court. The question which this case raises is what the nature of that enquiry is. Is it sufficient for the High Court simply to ascertain the facts found by the magistrate? Or is the High Court required to determine whether the procedure by which the offender was convicted was lawful and whether the conviction can stand? One member of the Court of Appeal thought the latter. The other two thought the former.

The course of the proceedings

[4] The petitioner is Vishwa Nadan. I trust that I will be forgiven for referring to him by his family name for convenience. He faced three charges of rape. The offences were alleged to have been committed in 2004, 2005 and 2006, ie before the enactment of the Crimes Act 2009, and he was therefore charged under sections 149 and 150 of the Penal Code. His alleged offending only came to light in 2008. He elected summary trial, and there was a considerable lapse of time before the proceedings got under way. For reasons which are not relevant for present purposes, that trial before the resident magistrate at Rakiraki Magistrates' Court had to be abandoned, and he had to be tried again by a different magistrate. Eventually, though, he was tried by the new resident magistrate at Rakiraki Magistrates' Court. The evidence was given over three days – on 21 and 22 May 2014 and 11 March 2015. That lapse of time was because at the end of the prosecution's case the magistrate had to rule on a submission that there was no case for Nadan to answer. Eventually, on 24 June 2015, following written submissions, the magistrate convicted Nadan on all three charges, and Nadan was transferred to the High Court at Lautoka for sentencing. On 8 October 2015, he was sentenced to 14 years' imprisonment on each charge, to be served concurrently with each other, making 14 years' imprisonment in all. A non-parole period of 12 years was also fixed.

[5] Nadan applied for leave to appeal against both his conviction and sentence[1]. His application for leave to appeal against his sentence was abandoned before it had been considered by a single judge of the Court of Appeal[2], and accordingly he was given leave to appeal against his conviction only. However, the written submissions filed on his behalf for the full hearing of his appeal to the Court of Appeal purported to resurrect his

[1] His application for leave to appeal against his sentence was ground 8 of his notice of appeal, which read: "That the sentence is harsh and excessive in all the circumstances."

[2] Ground 8 of his notice of appeal was abandoned in para 4 of the written submissions filed on his behalf in support of his application for leave to appeal.

application for leave to appeal against his sentence[3]. The Court of Appeal – somewhat benevolently – thought that there had been "no indication that his application for leave against the sentence had been abandoned"[4], and it considered the application for leave to appeal against sentence on its merits. In the event, it dismissed both the appeal against conviction and the appeal against sentence. Nadan now applies to the Supreme Court for leave to appeal against his conviction and his sentence.

The hearing in the magistrates' court

[6] The girl who Nadan was alleged to have raped was his brother's stepdaughter. She was 23 years old by the time she gave evidence at Nadan's trial, and Nadan was 49. In the years during which she claimed that Nadan had raped her, the whole family lived together in a house in Rakiraki. That included Nadan, his wife and children. The girl's evidence was that Nadan used to treat her differently from the other girls in the house. He would hug her from behind when she changed her clothes, he would tell her that he loved her, he would give her presents including a bracelet and he would write to her declaring his love for her.

[7] In the course of her evidence in examination-in-chief, the girl said that Nadan had raped her on three occasions. The first time was in October or November 2004 when she was 13 years old, and he was 39. It happened in her grandmother's room. Nadan had called her into the room. When she went in, he pushed her onto the bed, removed her clothes, kissed her all over her body, sucked her breast and licked her vagina. He then raped her vaginally. The same thing happened in April or May the following year, again in her grandmother's room. This time, Nadan had come into the room while she was there revising. The third time it happened was in August or September 2006. By then, the girl was 15 and Nadan was 41. This time it happened in her cousin's room, again while she was revising.

[8] She modified her evidence in cross-examination about the first two incidents. She said that what had happened on the first occasion was that she had been in her own room changing her clothes when Nadan had come in. He hugged her from behind, pushed her onto the bed, kissed her but then left, and did not rape her. She maintained that he had raped her on the next two occasions, but said that the incident in 2005 had happened in her room, not her grandmother's. Having said that, towards the end of her cross-examination, she went back to her original account of Nadan having raped her on all three occasions, including the occasion in 2004.

[9] The girl's evidence was that she had not told anyone about any of this because Nadan had threatened to eject her family from the house and to kill her. Her aunt was her best friend, and when her aunt moved nearer to her home, she told her aunt what had happened. Her aunt's evidence was that this had happened in 2008, and it was then that she and her husband had reported the matter to the police.

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[3] Those submissions concluded with the words: "The sentence given are *[sic]* in all the circumstances of the case harsh and excessive."

[4] See para 4 of the judgment of Prematilaka JA.

[10] The three charges reflected the three occasions on which the girl claimed to have been raped by Nadan. The Court of Appeal was under the impression that that these were representative charges.[5] That is, with respect, not correct. The charges reflected the whole of Nadan's alleged offending: the girl in her evidence did not say that this had happened to her on any other occasion.

[11] In his evidence Nadan denied that there had been any sexual activity between him and the girl at all. His relationship with her, he said, was like father and daughter. He could not think of a reason why she would tell the lies about him which she had, and he claimed that there had never been an opportunity for him to have behaved towards her as she claimed since there would never have been a time when just he and she would have been alone in the house as she was always at school and there were other family members always there.

[12] The girl was examined by a doctor in 2008, ie two years or so after the last of the three incidents. The girl told the doctor that there had been sexual penetration of her on one occasion, and that on the others the perpetrator had only inserted his fingers. The doctor said that her hymen was not visible. That was entirely consistent with the girl's case. But it is well known that the hymen can be ruptured by vigorous non-sexual activity, and understandably the girl was not asked whether she had had any other sexual experience by the time the doctor examined her.

[13] The magistrate found Nadan to have been evasive when he gave his evidence. He did not give examples of that, but it must have been one of the reasons why he did not believe him. The magistrate also thought that Nadan had been lying when he had said that there had never been a time when just he and the girl had been alone in the house: the evidence of the family members called to give evidence on his behalf did not support that. In addition, the magistrate did not believe Nadan's claim that the girl had always been at school. That was because the girl's teacher had given evidence that the girl had been missing school a lot. That was not a legitimate basis on which to reject Nadan's evidence on that issue as the girl's teacher's evidence only covered the period from 2007, ie after the last of the three incidents.

[14] Looking at the magistrate's judgment as a whole, the ultimate reason why he disbelieved Nadan's account was because there had been no reason for the girl to lie. In the absence of anything which might have caused her to concoct an untruthful account of sexually predatory conduct on her uncle's part, the magistrate was convinced that she had been telling the truth. He acknowledged the discrepancies in the girl's evidence, not only the inconsistencies in her evidence in court, but the differences between her evidence in court and in her witness statements, but he attributed that to the fact that when giving evidence in 2014 she was recounting incidents which had happened 8-10 years previously, and she could not be expected to be accurate in her recollection over every little detail. He described her as "unsophisticated and unassuming when reliving her past ordeal", which I

[5] See para 2 of the judgment of Prematilaka JA.

take to mean that she gave her evidence in a straightforward and unemotional manner. All in all, he found the girl credible, and he believed her account.

The hearing in the High Court

[15] In view of the subsequent contention that the High Court should have enquired into the correctness of Nadan's conviction, it is noteworthy that the written submissions filed on Nadan's behalf in the High Court addressed only the question of sentence. It is apparent from the judge's sentencing remarks that he had read the magistrate's judgment. He was therefore well acquainted with the facts of the case. He did not embark on an enquiry to determine whether Nadan had been rightly convicted, and no-one suggests that he was asked to do that. He correctly identified the tariff for the rape of a child as 10-16 years' imprisonment, and said that "[h]aving considered the nature of this offence and the seriousness surrounded [*sic*] with the commission of the offence", he selected 12 years' imprisonment as his starting point.

[16] The judgment continued with the judge setting out the facts of the case as follows:

> "The victim is the step-daughter of your brother and lived with her family at your family house, where you also lived with your family. You abused the trust and confident [*sic*] she has for you as an elderly family member in her own domestic family environment. You started doing this horrific crime on the victim when she was 13 years old. She stated in her evidence that she looked at you as a fatherly figure. However, you, instead of protect her with love and affection, you used her vulnerability in her childhood as a weapon to satisfy your reprehensible lust of sexual gratification. You dined her childhood[6], and natural growth with the nature by committing this crime. The victim impact report reveals that she had to abandon her school education and was sidelined by many of her relatives subsequent to this incident. You deceitfully plot [*sic*] this crime on the victim by using your position in the domestic environment. While doing such, you have threatened her that you will chase her family out of the house and kill her if she informs this shameful act to anyone, making her helpless against this act."

The judge treated these as aggravating factors justifying an increase in the starting point by three years to 15 years.

[17] When it came to mitigation, the judge treated Nadan's responsibilities to his family as not counting for very much in cases like this, but he took into account that Nadan was a first offender and had been in custody awaiting sentence for about 3½ months. Those factors caused him to reduce the overall sentence by one year to 14 years' imprisonment.[7] He did

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[6] I assume that this is a transcription error, and what the judge actually said was; "You denied her her childhood."

[7] Reducing the term by only 8½ months to reflect Nadan's lack of previous convictions was not inappropriate in this case. After all, he could hardly say that this was an isolated lapse after a lifetime of avoiding conflict with the law. This was offending which went on for almost two years.

not explain why the exemptions from fixing the mandatory non-parole period did not apply, nor did he say why he thought that a non-parole period of 12 years was appropriate.

The application for leave to appeal against conviction

[18] There are a number of grounds of appeal against conviction, but they boil down to four. The first is that there were a number of aspects of the evidence which the magistrate is said to have failed to consider or got wrong, and that had he considered them properly it would have cast a very different light on Nadan's credibility. The second relates to the failure of the High Court to consider whether Nadan had been lawfully convicted. The last two grounds of appeal were raised for the first time in the Supreme Court. I shall deal with each in turn.

[19] *The evidence which the magistrate ignored or misunderstood*. The reason the girl gave for not telling anyone about what she claimed Nadan was doing to her was his threats to kill her and to eject her family from the house. There may, of course, have been other factors – not least the well-documented reluctance of many girls in her situation to reveal sexual abuse of this kind. The criticism of the magistrate is that he failed to consider other parts of the girl's evidence which suggested that Nadan's alleged threats may not have been her real reason for keeping quiet about his abuse of her. For example, she acknowledged at one stage in the course of her cross-examination that she had not told anyone about the abuse because no-one had asked her about it. And at other times she is said to have agreed that she had not told anyone about it because there had been no-one at home at the time. The latter is irrelevant in this context: she said what she was saying to explain the opportunity which Nadan had had to rape her. And the fact that no-one asked her about it is all the more reason why she would have kept quiet about it in the light of the threats she had had received. It meant that no-one suspected what had been going on, and she may have thought that she would be even less likely to be believed.

[20] The defence go further. They say that the girl's evidence that she had not reported the abuse out of fear for what Nadan might do hardly sits well with correspondence in 2007 in which Nadan had told her that he still loved her and wanted to know whether she was interested in him, and her response that she was not interested in him. It is suggested that if she was prepared to write a letter of that kind, she would not have been too afraid to report his abuse. The difficulty with this argument is that although the girl referred to this letter in one of her witness statements, that witness statement was not produced at the trial. Since it was not even referred to in the evidence, there was no admissible evidence about it which the magistrate could have taken into account.

[21] One of the points argued by Nadan's counsel at trial was that it had not been in Nadan's gift to eject the girl's family from the house, and that Nadan's threat to do that was therefore an idle one. The magistrate dealt with that by saying that the girl's mother was unemployed, and so the girl was totally reliant on Nadan's family to look after her and her family. This approach is criticised on the basis that the girl said that her father was working, but that is to misunderstand the girl's evidence: her comment that her father was working related to only one of the days on which Nadan allegedly raped her, and his

absence working while the neither the girl's mother nor her grandmother were at home and while her father and Nadan's wife were out working gave Nadan the opportunity to rape the girl.

[22] In the course of her evidence, the girl said that her mother had asked her where she had got the bracelet from. The girl told her mother that Nadan had given it to her. The defence say that this would have been an ideal opportunity for the girl to tell her mother about the sexual abuse. The magistrate referred to this evidence in his summary of the girl's evidence, and although he did not say so in so many words, he must have concluded that this did not undermine the girl's evidence about what Nadan had done to her. It would have been open to the magistrate to conclude that.

[23] The girl was not asked in evidence about what she had told the doctor in 2008 about the abuse, but in his report the doctor described her as shy and embarrassed. The magistrate said that this may well have been the reason why she could not bring herself to describe to the doctor exactly what Nadan had done to her. No criticism is made of the magistrate in that respect. What the magistrate is criticised for is the use he made of the doctor's evidence about the lack of visibility of the girl's hymen. The magistrate said that this "added credibility" to her testimony. It was consistent with her evidence, of course, but could it be said to have gone further than that? I do not think so, but looking at the magistrate's judgment as a whole, I do not think that he gave much weight to it. What he regarded as supporting the girl's account were the lies which he thought Nadan had told about the house never being empty, and particularly the absence of any reason for the girl to lie about the abuse.

[24] The final issue relates to what the girl said in 2008 as a result of which this all came to ight. The girl's aunt in whom the girl confided gave evidence. Initially the girl had told her only that Nadan had hugged and kissed her, but eventually she told her aunt that there had been occasions when Nadan had had "forcible sex" with her, which I take to be sexual intercourse. The criticism of the judge is that he should have ignored this evidence as it was hearsay. I agree that it was hearsay; this was not admissible as evidence of recent complaint because of the lapse of time between the last of the incidents of alleged rape and the conversation with the girl's aunt. The fact that that the incidents had been reported to the girl's aunt merely explained how the incidents had first seen the light of day. What the girl told her aunt was relevant for that purpose only. However, when one reads he magistrate's judgment as a whole, it is plain that he does not rely on what the girl told her aunt as supporting her testimony.[8]

[25] *The approach of the High Court*. Section 190 of the Criminal Procedure Act 2009 ("the CPA") provides for the transfer to the High Court for sentencing of a defendant who has been convicted in the magistrates' court but where the magistrate thinks that the circumstances of the case are such that greater punishment should be imposed in respect

[8] In the Court of Appeal, it was contended that the magistrate had given insufficient weight to the changes which the girl had made to her account in her cross-examination. That is no longer a ground of appeal.

of the offence than the magistrate has power to impose. Section 190(3) of the CPA provides that in such a case:

> "The High Court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court."

In the Court of Appeal, Nadan's counsel argued that the words "enquire into the circumstances of the case" were broad enough to require the High Court to enquire into the procedure by which Nadan was convicted was lawful and to consider whether on the evidence he had been rightly convicted. Two of the judges, Prematilaka JA and Fernando JA, took the view that to do so was not permitted. The third judge, Nawana JA, thought otherwise. Their disagreement did not affect the outcome of the appeal as Nawana JA said that the judge in the High Court had "not observed anything legally objectionable in the conviction by the Magistrate in the process of his enquiry into *the circumstances of the case*."

[26] Had there been no other statutory provision on the topic, I would have had no doubt that the majority view was the correct one. The purpose of the provision was to enable a convicted defendant to be sentenced by a court with sufficient powers to pass the appropriate punishment. There is no need for the court to have the power to review the lawfulness or correctness of the conviction in order to determine the proper sentence. It is not as if the defendant cannot appeal to a higher court against his conviction. Section 190 (4) of the CPA provides:

> "A person transferred to the High Court under this section has the same right of appeal to the Court of Appeal as if the person had been convicted and sentenced by the High Court."

In these circumstances, the nature of the enquiry to be carried out by the High Court under section 190(3) of the CPA is to ascertain the facts found by the magistrate, as well as any other facts, which may be relevant to the determination of the proper sentence. The position might have been different if there had been no other route by which the defendant could question his conviction or the lawfulness of the procedure by which it was reached. But since such a route does exist, the argument that somehow section 190 creates some form of mechanism for the procedure by which the conviction was reached to be reviewed – in addition to an appeal under section 190(4) – falls away.

[27] So what led Nawana JA to think otherwise? Two considerations weighed heavily with him. The first was the width of the language. A remit to enquire into "the circumstances of the case" is very broad. If it had been intended to limit the enquiry to those facts which would enable the judge to determine the proper sentence, the section could have required him to enquire into "the circumstances warranting a greater sentence". The fact that broader language was used suggests that some wider enquiry was envisaged. Secondly, Nawana JA thought it wrong that the High Court – with its supervisory jurisdiction over

the lower courts – should be required to pass sentence on a defendant without satisfying itself that the lower court had acted lawfully in dealing with the case. Since the sentence to be passed by the High Court had to be lawful, it followed that the High Court should enquire into whether the conviction on which that sentence was to be based was itself lawful.

[28] Like Prematilaka and Fernando JJA, I do not share Nawana J's concerns. The language of section 190(3) takes colour from its purpose. That purpose it to invest the High Court with the power in certain circumstances to sentence a defendant convicted in the magistrates' court. Although broad language is used, it is necessary to link the circumstances to be enquired into with the particular function which the High Court has to perform. Since that function is to determine the appropriate sentence, the circumstances to be enquired into are those which enable the High Court to do that. And as for Nawana JA's concern that it is unseemly for judges to pass sentence in a case in which the conviction might have been vitiated by some unlawful process, the answer is that the Act provides the route for that defect to be remedied, namely by an appeal under section 190(4).

[29] I turn to the authorities on the topic. Two were relied on by Nawana JA: *The State v Prasad* [2004] FJHC 217 and *The State v Prasad* [2017] FJHC 598. These were both cases in which the defendant had been convicted in the magistrates' court and had been transferred to the High Court for sentencing. However, in both these cases, the High Court addressed the correctness of the convictions and quashed them. They did so under the High Court's revisionary jurisdiction. In the first case (*Prasad* 2004), the Court did so under section 325(1) of the Criminal Procedure Code which was the legislation in force at the time. In the second case (*Prasad* 2017), the Court did so under section 262(1) of the CPA, which was the successor of section 325(1) of the Criminal Procedure Code. There are no material differences between the two sections, and I cite just section 262(1) of the CPA for convenience, omitting irrelevant passages:

> "In the case of any proceedings in a Magistrates Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may–
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> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal … ; and
> (b) in the case of any order other than an order of acquittal, alter or reverse such order."

The question is whether the High Court in the present case should have invoked this jurisdiction.

[30] The record in the magistrates' court had not been "called for". It could only have been called for if the Chief Justice had requested it, and he had not: see section 260(2) of the CPA. Nor had the record "been reported for orders". That only applies when a magistrate wishes to report something to the High Court under section 261(2) of the CPA. So the

only route by which the High Court's powers under section 262(1) of the CPA could have been invoked in this case was if the record of the proceedings in the magistrates' court had come to the knowledge of the High Court in some other way. In this case, it had come to the knowledge of the High Court by the transfer of Nadan's case under section 190(3) of the CPA to the High Court for sentencing.

[31] So was the High Court's revisionary power under section 262(1) of the CPA intended to cover cases which had come to the knowledge of the High Court by that route? I do not think so. Section 190(3) of the CPA provided its own code for the nature of the enquiry to be conducted when a defendant is transferred from the magistrates' court to the High Court for sentence. That called for the High Court to enquire "into the circumstances of the case" so that the defendant "could be dealt with [as] if the person had been convicted by the High Court". They could not be dealt with [as] if they had been convicted by the High Court if section 190 permitted the High Court to conduct an enquiry which could lead to the quashing of the conviction. In other words, whatever the obligation to enquire into the circumstances of the case involved, it did not include an enquiry which could result in the quashing of the conviction. The majority of the Court of Appeal were right, and the two *Prasad* cases[9] should no longer be followed. What the High Court purported to put right in the *Prasad* cases should have been put right by an appeal to the Court of Appeal under section 190(4) of the CPA in *Prasad* 2017 (or in *Prasad* 2004 under its predecessor in the Criminal Procedure Code - section 222(4)).

[32] *The appropriateness of summary trial*. Some people might be surprised that an offence as serious as rape could have been tried in the magistrates' court. That cannot happen in those cases where the alleged rape took place after the enactment of the Crimes Act 2009 and the CPA. But since Nadan was charged with offences of rape under the Penal Code, the effect of section 5(2) of the CPA was that he could be tried in the magistrates' court with his consent, even though the trial took place after the enactment of the CPA. That is because no court was prescribed by the Penal Code as the venue for the trial on a charge of rape, and neither the Penal Code nor the Criminal Procedure Code distinguished between summary and indictable offences. That was the submission of Mr V Chandra, Nadan's counsel, and I agree with it. His argument was that, even though the magistrate had the power to try Nadan on these charges of rape, the magistrate should nevertheless have considered whether it was appropriate for Nadan to be tried in the magistrates' court, and to have exercised his power under section 191 of the CPA, which provides that "[a] magistrate may transfer any charges or proceedings to the High Court". The magistrate did not do that. This is a new ground of appeal. It was not argued in the Court of Appeal.

[33] There is a touch of irony about this argument. Nadan elected to be tried summarily; his counsel at trial did not argue for trial at a different venue; and only now, years later, does he complain that the magistrate should have taken it upon himself to go behind Nadan's personal wishes and address whether to override Nadan's own election. But that is not in itself a reason for rejecting the argument if it nevertheless has merit.

[9] As well as the case of *The State v Abraam* [2018] FJHC 1009 which followed and applied them.

[34] As it is, I cannot go along with the argument. The case was not one which was difficult to try. There were relatively few witnesses, and the issues were clear. No doubt the ultimate fact-finder would have been assisted by the views of assessors, but the critical issue in the case was who was telling the truth – the girl or Nadan. The magistrate was in as good a position to decide that as a judge sitting in the High Court. And it was not as if the magistrate's limited powers of sentence militated against summary trial. The magistrate could always transfer Nadan to the High Court for sentence. The seriousness of the offence was not, in the circumstances, a sufficiently compelling reason for the magistrate to override Nadan's wish for a summary trial.

[35] Mr Chandra reminded us that corroboration is no longer required in cases of a sexual nature, whereas it was before 2009. That is true, but I do not see how that affects the venue for the trial. Whether the trial takes place in the magistrates' court or the High Court, the rules of evidence – at least when it comes to corroboration – are the same. I can see how a defendant is disadvantaged by the abolition of the requirement for corroboration, but that does not make the magistrate's task more difficult than it was when corroboration was required.

[36] *The absence of reasons for the transfer*. Mr Chandra contended that the magistrate did not give sufficient reasons for concluding that, to use the words of section 190(1) of the CPA, "greater punishment should be imposed in respect of the offence than the magistrate had power to impose". Again, this is a new ground of appeal. It was not argued in the Court of Appeal.

[37] I cannot accept this argument at all. When transferring the case to the High Court for sentencing, the magistrate referred to the "guideline sentencing tariff for similar offences". He obviously had in mind that the tariff for the rape of a child or juvenile was 10-16 years' imprisonment, and having presided over the trial, he would have been aware of the aggravating features – not least that the court was having to sentence Nadan for three separate offences, committed over a period of almost two years, in circumstances amounting to a gross breach of trust.

The application for leave to appeal against sentence

[38] The challenge to the sentence is that the judge unwittingly double-counted some of the aggravating features. The argument runs like this. Having identified the tariff for the rape of a child as 10-16 years' imprisonment, the judge must have reflected some of the features which made this a serious case by taking 12 years as his starting point. That is because he said that one of the factors which had caused him to choose that starting point was "the seriousness surrounded with the circumstances of the offence". He then set out the aggravating factors which caused him to increase the length to 15 years. They were the age of the girl when the abuse began, the breach of trust which the abuse involved, the threats Nadan made to deter her from speaking out, and the impact which the abuse had on her. These were unquestionably all aggravating factors, but the difficulty is that we do not know whether all or any of these aggravating factors had already been taken into account

when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting.

[39] This illustrates the pitfalls inherent in the mechanistic way judges arrive at an appropriate sentence in Fiji – assigning a particular additional term for any aggravating features and a particular lesser term for any mitigating features. In many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. But the real problem which this case illustrates is the danger of a span of years representing the tariff without identifying where the judge should start within that tariff for a case without any aggravating or mitigating features. This problem has been highlighted before by the Supreme Court: see *Seninolokula v The State* [2018] FJSC 5 at paras 19 and 20 and *Kumar v The State* [2018] FJSC 30 at paras 55 and 56.

[40] Two other things which the Supreme Court said in *Kumar* at paras 57 and 58 in this context are relevant to the present case:

> "57. … First, a common complaint is that a judge has fallen into the trap of 'double-counting', ie reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.
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> 58. Secondly, the lower [end] of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided."

[41] *Seninolokula* and *Kumar* were, of course, decided well after the High Court passed sentence in Nadan's case, and the judge cannot therefore be criticised if he did not heed this advice. The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had therefore fallen into the trap of double-counting, I have considered for myself what the proper sentence in this case should be.

[42] It was, on any view, a bad case of its kind. I have already identified the factors which the judge rightly regarded as aggravating Nadan's offending. In addition there was the fact

that there were three separate incidents, and they spanned almost two years. The girl would continually have been in fear with Nadan continuing to live under the same roof. In my opinion, concurrent sentences totalling 14 years' imprisonment for the totality of Nadan's offending would have been appropriate.

The non-parole period

[43] As I have said, the judge fixed a non-parole period of 12 years. The judge was, of course, required to fix a non-parole period unless "the nature of the offence, or the past history of the offender", made the fixing of a non-parole period inappropriate. That was because the requirement to fix a non-parole period is mandatory where the head sentence is life imprisonment or two years' imprisonment or more, unless the nature of the offence or the past history of the offender justifies a different course being taken. In that event, the court may decline to fix a non-parole period: see sections 18(1) and 18(2) of the Sentencing and Penalties Act 2009.

[44] This requirement was recently considered by the Supreme Court in *Timo v The State* [2019] FJSC 22. Gates J at para 11 said that the question whether the nature of the offence or the past history of the offender should result in the court declining to fix a non-parole period had to be "specifically addressed" by the sentencing judge. As for the nature of the offence, he said at para 10 that a "less serious form of the offence may lead to a less severe approach and thus a decision by the court not to order a longer term to be served closer to the head sentence". And as for the past history of the offender, he said that "a person with a previous good character or with minor prior offending may be an appropriate candidate to be allowed the benefits of the one third remission[10] alone without an order for a period of ineligibility for parole". However, Lokur J went considerably further. He said at paras 36 and 37 that the power to fix a non-parole period should only be exercised in "exceptional cases and circumstances". He was saying, in effect, that not fixing a non-parole period should be the norm, and only exceptionally should one be fixed. On the face of it, that approach does not sit well with the statutory language.

[45] This is neither the time nor the place to address the dramatic shift in sentencing practice which Lokur J's comments represent. Apart from anything else, the parties had not proposed to address the court on *Timo* at all. But Gates J's comment about a defendant's previous offending history is particularly relevant to this case. Nadan had no previous convictions, and that would, in Gates J's view, have been important in determining whether a non-parole period should have been fixed in his case. As I have said, the judge gave no reasons for fixing a non-parole period in this case, or why he thought it necessary to fix one relatively close to the head sentence.

[46] The absence of reasons for fixing a non-parole period led the Supreme Court in *Timo* to remit the case back to the High Court for the appropriateness of a non-parole period to be

[10] This is a reference to the practice of the Commissioner of Prisons to release prisoners who have served two-thirds of their sentence if they have been of "good" behavior in prison.

reconsidered in the light of such submissions as the parties wished to make. The question is whether we should take a similar course. This was not a ground of appeal – understandably because the decision of the Supreme Court in *Timo* was delivered only after Nadan's petition had been filed. Accordingly, a few days before the hearing, we drew the parties' attention to the decision in *Timo*, but their opportunity to address us on whether a remission to the High Court was appropriate was obviously limited.

[47] It might be said that it is unnecessary to remit the case back to the High Court. The Supreme Court has the power to make such orders as "the circumstances of the case require". Some people might say that we are in as good a position as the High Court to decide whether a non-parole period should be fixed in this case, and if so, how long it should be. Having said that, remitting the case back to the High Court was the course taken in *Timo* in similar circumstances, and that is one of the reasons I would prefer to take that course.

[48] I add three things. First, it will be necessary for the Supreme Court to return to the issue of the fixing of a non-parole period to consider how Lokur J's view that the power should be exercised sparingly should be reflected in practice. It is well known that High Court judges are now confused about the course they should take. Some of the problems were highlighted in the very recent judgments of Perera J in *The State v Cama* [2019] FJHC 985 and Hamza J in *The State v Matia* [2019] FJHC 1004. For my part, I encourage the Director of Public Prosecutions and the Legal Aid Commission to choose a suitable case, sooner rather than later, for the topic to be explored. That is the other reason why it would be better for us to remit the case back to the High Court. It would be premature for us to determine whether Nadan should have a non-parole period fixed when the Supreme Court will, I hope, shortly rule on the correctness of Lokur J's approach.

[49] Secondly, I am alive to an irony at the heart of this debate, and that is that at present the fixing of a non-parole period should have no practical effect. It does **not** mean that a prisoner cannot be released before the expiration of the non-parole period. That is because the non-parole period is defined in section 18(1) of the Sentencing and Penalties Act 2009 as "a period during which the offender is not eligible to be released *on parole*" (emphasis supplied). Its effect is merely to limit the power of the Parole Board to recommend the release of a prisoner on parole. In other words, the fixing of a non-parole period is **not** a direction to the Commissioner of Prisons limiting his power to release a prisoner on remission once he has served two-thirds of his sentence. The fixing of a non-parole period is simply a direction to the Parole Board not to recommend the release of a prisoner on parole until he has served a particular proportion of his sentence. However, since Fiji does not at present have a functioning Parole Board, there are no circumstances in which a prisoner will be released on parole – at any rate for the time being. The effect of that is that so long as that remains the position in Fiji, the fixing of a non-parole period is a dead letter.

[50] It has been necessary for me to say that for two reasons. First, it may be that the Commissioner's practice is not to consider releasing a prisoner on remission until the non-

parole period has expired. If that is his practice, it needs to be put right. Secondly, there is a widespread belief that a prisoner cannot indeed be released on remission until that has happened. For example, Gates J said in *Timo* at para 7 that "remission earned cannot be entered upon until the period of non-parole ordered by the court is over". Similarly, Lokur J said in *Timo* at para 28 that "the effect of the Court directing a non-parole period on a convict is that the convict cannot be released prior to completion of the non-parole period". This, with respect, cannot be so. It equates a non-parole period to a minimum term, which is not the case.[11] It would be different, of course, if section 18(1) of the Sentencing and Penalties Act 2009 had not included the words "on parole", but once those words were included, they have to be given effect.

[51] The fact that the fixing of a non-parole period should have no practical effect at present does not mean that judges should not fix one in an appropriate case. As I have said, the fixing of a non-parole period is mandatory in those cases to which section 18 of the Sentencing and Penalties Act 2009 applies unless the circumstances are such that a non-parole period is inappropriate. Apart from anything else, if (as is hoped) a fully operational Parole Board begins to function in Fiji soon, the non-parole period will, of course, be important again.

[52] Thirdly, the remission to the High Court of the issue relating to the non-parole period fixed in Nadan's case does not necessarily open the floodgates to the appellate courts being inundated with appeals from prisoners who have had non-parole periods fixed without any reasons having been given. The interests of finality almost certainly mean that in many such cases it is now too late for the issue to be raised. For example, in other jurisdictions it has been held that it is only in truly exceptional circumstances that the time for appealing will be extended on the ground only that a subsequent judgment has held that the previous understanding of the law was incorrect.[12] That does not apply to this case as Nadan did not need to apply for an extension of time within which to appeal.

Conclusion

[53] For these reasons, I would grant Nadan leave to appeal against his conviction on the basis that the proper construction of the words "the circumstances of the case" in section 190 (3) of the CPA involves a substantial question of principle affecting the administration of criminal justice. I would also grant him leave to appeal against sentence on the basis that a substantial and grave injustice might have occurred in the light of the possibility that the judge fell into error by "double-counting" and his lack of reasons for fixing a non-parole period. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for leave to appeal as the hearing of the appeal. I would dismiss the

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[11] I acknowledge that Marsoof J said in *Paula Tora v The State* [2015] FJSC 23 at para 13 that "the concept of a 'minimum term' has now been subsumed in the concept of a 'non-parole period'. Indeed, I agreed with his judgment. But we had not at that stage had our attention drawn to the effect of the words "on parole" in section 18(1) of the Sentencing and Penalties Act 2009.

[12] See, for example, the decision of the Court of Final Appeal in Hong Kong in *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614.

appeal against conviction. I would dismiss the appeal against the concurrent head sentences of 14 years' imprisonment, but I would set aside the non-parole period, and remit back to the High Court, for determination in the light of the judgment in *Timo*, this judgment and any subsequent judgment of the Supreme Court in the meantime, the questions whether a non-parole period should be fixed and if so what its length should be.

Orders:

(1) Application for leave to appeal against conviction and sentence granted.
(2) Appeal against conviction dismissed.
(3) Appeal against sentence dismissed, save that the non-parole period is set aside, and the case is remitted to the High Court for further consideration of whether a non-parole period should be fixed, and if so, for how long.

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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

.....
Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

.....
Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

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