IN THE SUPREME COURT OF FIJI

AT SUVA

CRIMINAL PETITION NO: CAV 0013 of 2022

Court of Appeal No. AAU 135 of 2017

BETWEEN **AKUILA NAVUDA**

Petitioner

THE STATE

Respondent

Coram **The Hon. Mr. Justice Brian Keith**

Judge of the Supreme Court

The Hon. Mr. Justice William Young

Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki

Judge of the Supreme Court

Counsel **Petitioner in person**

Dr. A. Jack for the Respondent

Date of Hearing **4 October 2023**

Date of Judgment **26 October 2023**

JUDGMENT

Keith J.

Introduction

1. Defendants who are convicted of serious crimes invariably seek leave to appeal. They are sometimes unrepresented. There can be many reasons for that. Their lawyers – usually someone from or instructed by the Legal Aid Commission – may have taken the view that there were no arguable grounds of appeal to justify drafting a notice of appeal. The defendant may have become dissatisfied with his lawyers and thought that he could do a better job himself. He may have thought that there were things he could say which he knew his lawyer could not. Or he may not have been able to get a lawyer at all because the Legal Aid Commission had declined to provide him with legal assistance and he could not afford a lawyer in the private sector.

2. Anyone who has sat in an appellate jurisdiction in Fiji knows that unrepresented appellants (I use this term to include unrepresented applicants for leave to appeal) frequently file multiple documents setting out their grounds of appeal. Many of these documents will be written in hand by the appellant. Many of them will not have been drafted as crisply as a lawyer would have drafted them. They are frequently rambling, repetitive and very lengthy. And above all, because these appellants are unfamiliar with the limited powers of the appellate courts, their documents tend to re-argue the case rather than point to where the trial court went wrong in law.

3. All of this places a considerable burden on the Court of Appeal in those cases where the appellant is unrepresented. It has to spend a great deal of time sorting out the wheat from the chaff, and then identifying those grounds, if any, which may have merit. There have occasionally been times when the Court of Appeal has failed to see the point which the appellant is driving at, and even times when the Court of Appeal thought that the appellant was relying on the grounds set out in one document when in fact the appellant was relying on grounds in another of his documents. I fear that in this case the Court of Appeal fell into that latter error. In order to explain why, it is necessary to go into things in some detail. I trust that I will be forgiven for doing that.

4. Having said that, when it comes to the sentence passed on the appellant in this case, there are a number of concerns – whether there was an element of double-counting in the assessment of the proper head sentence, and whether the non-parole period was too close to the head sentence.

These issues were not raised by the appellant, and it will be necessary to address them, as well as the question whether the Supreme Court has the jurisdiction to consider them.

The history of the case

5. The applicant, Akuila Navuda, was charged with rape. The offence was alleged to have taken place on 22 December 2006. That was before the repeal of the Penal Code, and the charge accordingly alleged contraventions of the relevant provisions of the Penal Code. He was tried in Suva Magistrates' Court. The trial commenced on 7 January 2014. Akuila was legally represented at the time. For various reasons, the trial was not completed then, and it resumed on 7 February 2017. Akuila was unrepresented then, but the court record shows that he wanted to represent himself[1]. The trial was completed that day but while the magistrate was considering the case Akuila failed to answer to his bail. A bench warrant was issued, and following Akuila's arrest the magistrate eventually convicted him on 10 March 2017. The magistrate ordered that he be transferred to the High Court for sentence.[2] On 3 August 2017 he was sentenced to 17 years' imprisonment with a non-parole period of 16 years.

6. Akuila sought leave to appeal against both his conviction and sentence. The prosecution asked for a single judge of the Court of Appeal to dismiss the appeal summarily under section 35(2) of the Court of Appeal Act 1949. The single judge refused to do that. He took the view that one of the grounds of appeal raised a question of law only, so that an appeal on that ground lay of right and leave to appeal was not required. After considering some of the other grounds of appeal, he gave Akuila leave to appeal against both conviction and sentence. The full Court of Appeal dismissed the appeal against conviction, but allowed the appeal against sentence by reducing Akuila's term of imprisonment from 17 years to 16 years, and reducing the non-parole period from 16 years to 15 years. Akuila now applies to the Supreme Court for leave to appeal against both his conviction and his reduced sentence.

The facts

7. The evidence which incriminated Akuila came from the woman who he is alleged to have raped. She was studying to be a nun at a training centre in Wailoku[3]. I shall refer to her as the novice

---

Page 284 of the Record of the High Court

2 The order of transfer was drawn up incorrectly. It purported to record that "the arraignment" of Akuila had been transferred to the High Court pursuant to section 35(2)(b)(i) of the Criminal Procedure Act 2009. Since Akuila had already been tried and convicted, a transfer to the High Court so that he could be tried made no sense. What the magistrate must have intended to do was to order Akuila's transfer to the High Court for sentence under section 190(1) of the Criminal Procedure Act.

3 The charge stated that the rape had occurred in Samabula. That was incorrect, but it made no difference to the validity of the charge.

from now on. Her evidence was that in the early hours of the morning on the day in question, she had left the centre for a separate building nearby to light the fire. Suddenly someone switched off the light in the building, and she saw someone behind her. Her assailant then covered her mouth with one hand and put a knife to her neck with the other. She screamed, and was told that if she screamed again, she was dead. The novice's evidence was that dawn was breaking and that it was not "really dark".

8. By this time the novice had realised that her assailant was a man. He dragged her at knifepoint into a nearby plantation. That was where she said he raped her. It is unnecessary to spell out her evidence of the course which the rape took, but it went on for a good few minutes, and included not merely penetration of her vagina with his penis, but him also putting his tongue into her vagina and putting the knife inside it, not deeply, but sufficient for her to feel its tip. In her evidence, she said that she had had plenty of time to see his face. By then it had become "brighter".

9. The novice did not report the incident at first. In order to study to be a nun, you have to be a virgin. She was afraid that if it became known what had happened to her, she would have to give up her studies. However, she became distressed one day some time later when the topic which was being discussed in class was vows. Those vows included a vow of sexual abstinence. The sister at the centre who was in charge of the class asked her what the problem was, and outside the class the novice told the sister that she had been raped. In due course, the police were informed. The novice told them that she would be able to identify the man who had raped her. She was shown two albums containing photographs of various men. So far as I can tell, there was no evidence of who these men were. The Court of Appeal assumed that they amounted to a "rogues' gallery" – in other words, men who had been convicted or suspected of various offences, That assumption may well have been correct, but whether it was or not, Akuila's photograph was among those in the albums, and the novice picked him out as the man who had raped her. Her evidence was that she was 100% sure that it was him. Since Akuila was charged with the offence on 20 February 2007 – presumably very shortly after the identification of him had taken place – it may be inferred that the time which had elapsed between the novice being raped and her telling the sister about it was two months less a few days.

10. The sister also gave evidence. She said that she had recently noticed a change in the novice. She no longer was her normal self. When the novice became distressed in class, she stopped the class, and asked to see the novice. The novice told her what had happened in similar, though

less detailed, terms to the account she had given in court. It was the sister who reported the matter to the police, and she had been present when the novice had picked Akuila's photograph as that of the man who had raped her.

11. Akuila elected to give evidence. He admitted living in a village within walking distance of Wailoku but denied raping the novice. He claimed that he had not even gone to Wailoku on the morning in question, but had gone to work instead. He called no witnesses, telling the magistrate that there were four witnesses who were not at court, but it does not look as if he asked for an adjournment for them to be called. At an earlier hearing a lawyer from the Legal Aid Commission had informed the magistrate that they would be filing an alibi notice[4], but it does not look as if one was ever filed.

12. These facts show that the only evidence implicating Akuila in the rape of the novice was her identification of him. The evidence of the sister merely went to the novice's credibility in the sense that her account at trial was consistent with what she had said when talking to the sister. It did not, of course, amount to corroboration of her account, though corroboration is no longer required in cases of this kind. And although the sister's evidence was that the novice had been examined by a doctor and that swabs had been sent to a laboratory for testing, there was no evidence about what the examination or the tests had revealed. Nor was any evidence given of a confession or any incriminating statements by Akuila following his arrest. The plain fact is that without the evidence of identification, there was nothing to implicate Akuila in the rape.

The magistrate's judgment[5]

13. The magistrate believed the novice's claim to have been raped. He noted that she had acknowledged that she had not seen the man sufficiently clearly to identify him at first, and he regarded that as supporting her credibility. Indeed, he accepted the reason she gave for not reporting the matter earlier. Having found that she had been raped, he then went on to address whether it had been Akuila who had raped her – in other words, the extent to which he could rely on her identification of Akuila, which the magistrate described as "[o]ne of the crucial issues" in the case. He asked himself the questions which the guidelines in the judgment of the Court of Appeal in England and Wales in *R v Turnbull* (1997) 63 Cr App R 132 (*per* Lord Lane CJ) suggest should be addressed where the case against a defendant depends wholly or substantially on the identification of the defendant which the defence alleges to be mistaken.

4 See the entry in the court record for 11 February 2014: page 271 of the Record of the High Court
5 Pages 161-170 of the Record of the High Court

He warned himself that the novice may have been mistaken, but taking everything into account – in particular, the length of time the novice could see her assailant and the state of the light – he was sure that her identification of Akuila as the rapist was correct.

The reasons for sentence[6]

14. The judge took the view that this was a very bad case of rape. The aggravating factors which he thought were present were the use of the knife to terrify his victim, the fact that his attack on her was planned for early in the morning when other people were likely to be sleeping making this rape a premeditated one, and his lack of regard for the novice, which I take to be reference to the fact that she was a novice nun who was a virgin and for whom any sexual encounter would be shocking. He reduced the sentence he would otherwise have passed by two years to reflect the time which Akuila had spent in custody on remand.

The delay

15. The lapse of time in excess of 10 years between when Akuila was charged and when he was convicted is truly shocking. Some of that delay was attributable to Akuila not answering to his bail. Bench warrants had to be issued on a number of occasions to secure his attendance in court, and the delay attributable to his persistent failure to answer to his bail was not inconsiderable. Moreover, his lawyers were responsible for some of the delay. They misplaced some of the disclosures which had been provided to them, they failed to provide particulars of Akuila's objections to incriminating statements which he was alleged to have made when interviewed which the prosecution at one stage was proposing to rely upon, and they frequently told the court that they were not ready for trial when they should have been. But much of the delay was attributable to both the prosecution and the court. The judge said that the prosecution should have taken a more determined attitude to bring the case to a conclusion, and the court should have adopted a more robust approach to its powers of case management. The judge described it all as a "sorry state of affairs". It was this delay which caused the Court of Appeal to reduce Akuila's sentence by a year.

The appeal to the Court of Appeal

16. Akuila's notice of appeal (which he drafted himself and which he called his petition of appeal) is dated 7 August 2017[7]. It contained a number of grounds of appeal against both conviction

---

6 Pages 176-179 of the Record of the High Court

7 Pages 6-8 of the Record of the High Court

and sentence ("the first set of grounds"). Many of those grounds are difficult to follow, but to the extent to which they are comprehensible, they did little more, for the most part, than to re-argue the case. For example, Akuila asked why it took so long for the novice to report the rape, he pointed to the absence of any medical evidence or any eye witness or any identification parade, and he argued that it had been too dark for the novice to see her assailant sufficiently to be able to identify him subsequently. These were all issues for the magistrate to take into account, and there is no basis for saying that he ignored any of them or that he failed to give them the weight they deserved. As for his sentence, Akuila's grounds were a little rambling, but they amounted to little more than a contention that the term of imprisonment was harsh and excessive.

17. Grounds of appeal were contained in a further document dated 10 December 2018 and filed two days later ("the second set of grounds")[8]. It described these grounds as "very much arguable". Although signed by Akuila, they were typed in such a way, and used such language, as suggested that they might have been drafted by a lawyer. Having said that, some of the grounds advanced in this document were not ones which any lawyer would have advanced – for example, the contention that the magistrate had overlooked inconsistencies in the evidence called by the prosecution, when in truth there were no such inconsistencies, and the contention that the magistrate had taken into account the novice's "circumstantial evidence", when in truth her evidence relating to identification was direct evidence that Akuila had been her assailant. In any event, most of the other grounds in effect repeated the previous grounds and again amounted to little more than an attempt to re-argue the case.

18. These grounds were replaced by two further documents, both handwritten by Akuila, which were filed on 5 April 2019[9]. He said that they had been prepared with the assistance of a friend in prison. The first of those documents consisted of grounds of appeal which Akuila said were the only grounds of appeal he was going to pursue and replaced his previous grounds ("the third set of grounds"). The second of those documents set out Akuila's submissions on the law.

19. The prosecution purported to respond to the grounds of appeal by written submissions dated and filed on 10 May 2019[10]. However, the prosecution thought that the grounds which Akuila wanted to rely upon were the second set of grounds[11], despite his statement in the third set of

---

8 Pages 9-11 of the Record of the High Court

9 Pages 12-67 of the Record of the High Court

10 Pages 83-110 of the Record of the High Court

11 That is apparent from para 8 of the prosecution's submissions where it is stated that the document filed by Akuila on 5 April 2019 (the third set of grounds) "appears to affirm that the grounds of appeal are those recorded in [the grounds]

grounds that the third set of grounds were intended to replace the second set of grounds. Accordingly, the prosecution's response addressed the wrong set of grounds. This response was the final document filed by the time the prosecution's application for the summary dismissal of the appeal was considered by the single judge.

The single judge's ruling

20. It was, no doubt, because the prosecution had addressed the second set of grounds that the single judge did the same thing[12]. He thought that one of the grounds which Akuila had raised was that he had never elected to be tried at the magistrates' court. The single judge said that this ground raised an issue of law for which leave to appeal was not required. The single judge then addressed three grounds which he rejected. One was that Akuila had not been legally represented at his trial. He rightly rejected that contention. Akuila had been represented at his trial, save on the final day when he told the magistrate that he wished to represent himself. Another related to how the magistrate had approached the issue of identification. I return to that in paras 24 and 26-28 below. The third related to a contention which the single judge thought Akuila was making – namely that the novice had not given evidence at his trial. That was wrong: she *had* given evidence. However, the single judge granted Akuila leave to appeal against both conviction and sentence. As for Akuila's conviction, the single judge took the view that Akuila had been disadvantaged by the delay and what he described as "the withdrawal of his Counsel". As for the sentence, the single judge thought it arguable that insufficient account had been taken of such delay for which Akuila had not been responsible.

The Court of Appeal's judgment

21. The Court of Appeal also addressed the second set of grounds[13]. It disagreed with the single judge's view that Akuila was contending that he had never elected to be tried in the magistrates' court. It thought that Akuila was contending that his case should not have been transferred to the High Court for sentence. I agree with the Court of Appeal's reading of this ground of appeal. Akuila was not complaining that he had not elected trial by magistrate. He was complaining about the sending of his case to the High Court for sentence. The Court of Appeal rightly rejected that contention. The transfer of Akuila's case to the High Court was

---

filed on 12 December 2018 [the second set of grounds], and simply asserts that those grouinds are 'very much arguable'". The reference to the grounds being very much arguable was in the second set of grounds, not the third set of grounds.

12 That is apparent from para 4 of the judgment of the single judge (pages 1-4 of the Record of the High Court) in which he quoted verbatim a particular ground which appeared only in the second set of grounds.

13 That is apparent from para 5 of its judgment (pages 7-15 of the Record of the Supreme Court) in which it quoted verbatim the ground which the single judge had quoted and which had appeared only in the second set of grounds.

the only sensible course open to the magistrate, even though the order for transfer was wrongly drafted. The Court of Appeal rightly rejected the contention about the sufficiency of Akuila's legal representation at his trial. The only other ground of appeal against conviction which the Court of Appeal considered related to the reasons which the single judge gave for granting leave to appeal. The Court of Appeal reviewed in summary form the history of the proceedings and concluded that the ground had not been made out. I agree with the Court of Appeal. I do not read Akuila as having complained in any of his grounds of appeal that the fairness of his trial had been compromised by the delay. He relied only on the delay as a factor relevant to his sentence. And the fact that his lawyer did not turn up on the last day of the trial is immaterial once Akuila had told the magistrate that he wanted the trial to go ahead on that day without his lawyer. However, when it came to the appeal against sentence, the Court of Appeal agreed with the single judge that the delay in bringing the case to a conclusion warranted a reduction in his sentence, which was why the Court of Appeal reduced his sentence in the way I have previously described.

The current grounds of appeal against conviction

22. There is now only one ground of appeal against conviction[14]. It is that the Court of Appeal failed to address properly the grounds of appeal. In my view that ground is made out. The Court of Appeal did not address the grounds in the third set of grounds which were the grounds on which Akuila wanted to rely. Rather than remit the case back to the Court of Appeal to address those grounds, I think that the appropriate course for the Supreme Court now to take is to address those grounds for itself. The last thing we should do is to add to the delay in finally disposing of this case. There are five such grounds, and I propose to address each separately.

23. *Ground (1): Assessing credibility and warning of the danger of identification evidence.* Akuila contended that the magistrate did not adequately assess the novice's credibility and did not give himself an adequate warning about the danger of identification evidence. The first of these arguments is untenable. The magistrate noted her demeanour, found her to be "trustworthy", by which he meant, I assume, that she gave her evidence in a way which made her account plausible and believable, referred to her standing by her account despite strong cross-examination, and took the view that she did not "distort" her evidence, by which he meant, I assume, that she did not exaggerate it. The fact is that he believed her, and although

14 Page 1 of the Record of the Supreme Court.

he did not say so in so many words, he must have thought that there was no reason for her to lie.

24. I turn to the argument that the magistrate did not give himself a sufficient warning about the danger of identification evidence. The case of *Turnbull* (*op cit*) to which the magistrate referred sets out the directions which a judge should give about identification evidence to a jury. It has regularly been applied in Fiji where directions are given to assessors. The magistrate did much of what *Turnbull* required. He asked himself the questions which Turnbull said should be asked in connection with the requirement to examine closely the circumstances in which the novice's identification of Akuila had been made, and he warned himself that the novice could have been mistaken. There are other things which assessors should be told. Some of those things are relevant to the present case, but some are not. The things relevant to the present case are that they should be warned of the special need for caution before convicting on identification evidence alone, together with the reason for that need, and they should be told that a mistaken witness can be a convincing witness. The magistrate did not remind himself of that in so many words. I am not troubled by that at all. The magistrate quoted a long extract from *Turnbull* in his judgment, and that extract referred to both these matters. He was therefore alive to them. He did not have to spell them out again.

25. *Ground (2): Assessing the evidence independently.* Akuila contended that the magistrate failed to carry out an independent assessment of the evidence. However, since this criticism of the magistrate was all about the way the novice had identified him from the albums of photographs she was shown, and since that is the subject of the third of his grounds, this ground can properly be put to one side.

26. *Ground (3): The identification evidence.* Two points are taken as I read this ground of appeal. First, the novice should not have been shown albums containing photographs of various men, and in any event it did not amount to a proper identification procedure. Secondly, there had been a dock identification of him by the novice, and that should not have happened. I deal with each of these points separately.

27. There was, in my opinion, nothing wrong in showing the albums to the novice in the course of the investigation by the police into her complaint. It was an obvious tool to use in order to determine who might have been the rapist. And having identified Akuila from the albums, it would have been wrong for a recognised identification procedure to have taken place. Had there been one, and had she picked out Akuila, that could have been because she recognised him as the man in the photograph she had selected rather than because she recognised him as

the man who had raped her. Her identification of Akuila from the albums was not the best identification evidence because it lacked some of the safeguards associated with a recognised identification procedure. There was no evidence, for example, that she had been warned that her assailant might not be among the photographs, nor was there any evidence that the albums included photographs of men who were not dissimilar in appearance to Akuila in order to prevent him from standing out unduly. However, the fact that it was not the best identification evidence did not prevent the magistrate from relying on it if he thought it reliable, which he did.

28. I do not think that Akuila is right when he says that there was a dock identification – at any rate in the sense in which that phrase is normally used. It is true that the magistrate said in his judgment that the novice "also identified the accused person in Court". However, that did not occur in the course of her examination-in-chief. She was not asked whether she saw in court the man who had raped her. What happened was that when she was being cross-examined about her identification of Akuila from the photographs, she volunteered that she had recognised him when she had seen him in court the previous day. It was for the magistrate to decide whether that supported her previous identification of Akuila from the photographs. He thought it did.

29. *Ground (4): The demeanour of the novice.* Akuila contended that the magistrate had been wrong to accept the evidence of the novice on the basis only of her demeanour. That is incorrect. He took into account other things, which I have referred to in para 23.

30. *Ground (5): The absence of the novice.* Akuila contended that he should not have been convicted when the novice did not give evidence. The argument hardly sits well with the contention that the magistrate relied on the novice's demeanour! This was one of the arguments considered by the single judge. It is wrong: she did give evidence.

The grounds of appeal against sentence

31. *Delay.* Akuila raised two grounds of appeal against sentence in the various documents which he wanted the Court of Appeal to consider. One can be rejected straight away. It was that the judge should not have treated his use of a knife as an aggravating factor because it was not produced as an exhibit at his trial. The other ground was of more substance. It related to the delay in bringing him to trial. Section 14(2)(g) of the Constitution provides that every person charged with an offence has the right "to have the trial begin and conclude without unreasonable delay". Where there has been unreasonable delay which has prevented the

defendant from having a fair trial, the trial should be stayed. No application was made to the magistrate for a stay, but how does unreasonable delay which has not rendered the trial unfair affect sentence? Dr Andrew Jack for the prosecution argued that it should not affect sentence at all. He pointed to section 4(2) of the Sentencing and Penalties Act 2009 which lists the factors which the court must have regard to when sentencing offenders. Delay in bringing a case to trial is not one of them. Dr Jack also pointed to the current methodology for sentencing offenders set out in the well-known passage in the judgment of the Court of Appeal in *Naikelekelevesi v The State* [2008] FJCA 11 at paras 22 and 23:

> "22. In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the *offence* [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the *offender* which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from a mitigating factor in a case.
>
> 23. In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or … the facts that were outlined to the appellant after his guilty [plea] was entered … In doing this the court is taking cognizance of the aggravating features of the offence." (Emphasis supplied)

Dr Jack said that the time taken for the case to come to trial does not fall within either the assessment of the offence or the features relating to the offender. That is not to say that a defendant whose case has been the subject of unreasonable delay is left without a remedy. Constitutional redress, said Dr Jack, can be sought on an appropriate application to the High Court under section 100(4) of the Constitution.

32. The Court of Appeal did not address these arguments at all. It simply recounted the history of the proceedings, and concluded (*per* Gamalath JA) at para 17:

> "Considering such factors and their cumulative effect on the speedy justice, I am inclined to grant the appellant the levity of a reduction of the sentence of imprisonment by one year."

For my part, I cannot go along with Dr Jack's argument at all. Section 4(2) of the Sentencing and Penalties Act merely lays down the factors which the sentencing court *must* have regard to, It says nothing about limits on what additional factors the sentencing court *may* have regard to. And as for the methodology for sentencing stated in *Naikelekelevesi*, Dr Jack's contention ignored the court's obligation to take into account "the mitigating factors which

will decrease the sentence". While defendants are awaiting trial, time very often stands still. They can make no plans for the future as they do not know what the future may hold. And they have the constant worry about the outcome of the case. Commonsense makes unreasonable delay in bringing a case to trial an obvious mitigating factor. Indeed, one of the authorities relied upon by Akuila shows that the courts regard unreasonable delay which has not prevented the defendant from having a fair trial as a mitigating factor. In *Salim v The State* [2008] FJCA 124, the Court of Appeal said at para 29:

> "Where the issue [of unreasonable delay] is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence,"

33. Akuila contended in the Court of Appeal that his sentence should be reduced to 7 years' imprisonment, and the non-parole period to 4 years, for the delay in bringing his case to trial. That was far too optimistic a contention. For one thing, his sentence had to be reduced only to reflect the delay for which he was not responsible. The High Court has in the past sought to do that by not fixing a non-parole period[15], and the Court of Appeal did the same thing very recently[16]. It is questionable whether that can be done now: after all, the discretion which the courts had not to fix a non-parole period in an appropriate case was removed with effect from 22 November 2019 by the repeal of section 18(2) of the Sentencing and Penalties Act. The appropriate course to take was to reduce what would otherwise have been the appropriate head sentence. In my opinion, the Court of Appeal was right to reduce the head sentence by only one year. That was an entirely proportionate reduction. Any longer reduction would have resulted in Akuila getting an unjustifiable windfall.

34. *The tariff.* Akuila's only ground of appeal in the Supreme Court against sentence relates to the tariff for rape which the judge took[17]. It was not a ground which Akuila had argued in the Court of Appeal. That tariff was 7-15 years' imprisonment. Akuila claims that this tariff represents the tariff for rape since the repeal of the Penal Code and the enactment of the Crimes Act 2009, whereas the tariff which the judge should have taken was the tariff which prevailed while the Penal Code was in force. Even if that argument is correct, it does not help Akuila. The tariff for rape while the Penal Code was in force as well as since then has been 7-15 years' imprisonment. Indeed, the four cases which the judge referred to in his sentencing remarks

---

15 *The State v Pio* [2017] FJHC 177 (*per* Goundar J) and *The State v Visawaqa* [2017] FJHC 178.(*per* Goundar J)
16 *Chandra v The State* [2023] FJCA 207 (*per* Mataitoga J).
17 Page 1 of the Record of the Supreme Court.

which he regarded as authorities for the tariff for rape being 7-15 years' imprisonment were all decided before the repeal of the Penal Code.

35. That leads me to something else. Dr Jack contended that because this ground had not been relied on previously, the Supreme Court did not have "the jurisdiction" to consider it[18]. That was, at first blush, a startling proposition. The Supreme Court has jurisdiction under section 7(2) of the Supreme Court Act 1998 to grant leave to appeal, *inter alia*, where a "substantial and grave injustice may otherwise occur". It would be very surprising if that could be trumped in the event of the appeal to the Supreme Court raising a new argument which it had not occurred to a defendant or his legal team before. But Dr Jack had recent authority on his side. It is the Supreme Court's judgment in *Baka v The State* [2023] FJSC 35, a case heard during the last session of the Supreme Court. The Court of Appeal had dismissed an appeal against conviction, and the defendant had sought leave to appeal to the Supreme Court. The Supreme Court took its cue from section 98(3) of the Constitution which provides for the Supreme Court to be the final appellate court with exclusive jurisdiction to hear and determine appeals from "all final judgments" of the Court of Appeal. The decision of the Court of Appeal in that case was said to have been a reasoned judgment in which each of the specific points raised on the appeal had been "carefully examined and definitively determined". None of those grounds of appeal, nor any aspect of their determination, were being challenged on the appeal to the Supreme Court. The grounds of appeal to the Supreme Court were new: they bore no resemblance to the arguments considered by the Court of Appeal, and had not been considered at all by the Court of Appeal. The Supreme Court concluded in para 15 *(per* Goddard J):

> "On that basis, there is no final judgment of [the Court of Appeal] in respect of which this Court can exercise its discretion to grant leave and thus no jurisdiction for this Court to do so."

36. In the absence of authority on the topic, I would, with great respect, have been unable to go along with that. The term "final judgment' is invariably used to describe a judgment which is not an interlocutory one. It has, so far as I can tell, never been used to describe a judgment which cannot be challenged on new grounds. However you look at it, there had been in *Baka* a final judgment of the Court of Appeal: the appeal had been considered on its merits and had been dismissed. In the absence of a successful appeal, the Court of Appeal had finally determined the appellant's guilt. The mere fact that the appellant relied on new grounds in the Supreme Court did not mean that there had not been a final judgment of the Court of

---

18 Para 14 of his written submissions to the Supreme Court dated and filed on 29 September 2023

Appeal. The Supreme Court did not, of course, have the benefit of the Court of Appeal's views on those new grounds, but that did not affect the nature of the Court of Appeal's judgment. It was still a final judgment of the Court: Indeed, the Constitution refers to "all" final judgments of the Court of Appeal, not final judgments only on those grounds relied on in the Court of Appeal.

37. However, the Supreme Court took the view that its stance was supported by authority. It referred to two cases. The first was *Cava v The State* [2022] FJSC 1. The Supreme Court was being asked to extend the time for filing a petition to the Supreme Court for leave to appeal against sentence. In a reserved judgment handed down 9 months later, Kumar P sitting alone refused the application on the basis that the Supreme Court had no jurisdiction to consider the application for leave to appeal. That was because the applicant had originally appealed to the Court of Appeal against conviction and sentence, but had then abandoned his appeal against sentence. Kumar P held that since there had been no judgment by the Court of Appeal on the appeal against sentence, the Supreme Court had no jurisdiction to hear an application for leave to appeal against sentence, and accordingly an extension of time would not be given. The distinction between that case and the present one is obvious. In *Cava*, there had been no judgment in the Court of Appeal on the appeal against sentence as it had been abandoned. In the present case, there had been a judgment on the appeal against sentence, albeit addressing different grounds from the one now relied upon.

38. The other case on which the Supreme Court in *Baka* relied was *Vagewa v The State* [2016] FJSC 12. In that case, the applicant had been tried and convicted in the magistrates' court. He appealed against conviction and sentence to the High Court. His notice of appeal was lodged out of time. The High Court refused to extend time because it took the view that both his appeal against conviction and his appeal against sentence would fail. The applicant appealed against the High Court's refusal to extend time, but only on the basis that his appeal against sentence was sufficiently arguable to be heard. The Court of Appeal dismissed the appeal. However, when the applicant filed a petition to the Supreme Court for leave to appeal, he made it clear that he now wanted to appeal against conviction as well as sentence. His sole ground of appeal against conviction was that he should have been legally represented at his trial. The Supreme Court noted that the magistrate had referred to the applicant having "waived his right to counsel" at the beginning of his trial. In dealing with this new ground, the Supreme Court said (*per* Gates P) at para 29:

> "This ground was not raised in the High Court or the Court of Appeal. In such circumstances this court would not entertain a fresh ground of appeal *unless its significance on the special leave criteria was compelling*. It does not meet that standard and must fail." (Emphasis supplied)

In other words, the Supreme Court did not say that it had no jurisdiction to consider a new ground of appeal which had not previously been raised. It was saying that in that particular case the new ground did not meet the threshold for permitting appeals to the Supreme Court to proceed.

39. It can be seen, therefore, that neither of these cases supported the view taken by the Supreme Court in *Baka*. For the reasons given in para 36 above, I would respectfully decline to follow *Baka*, and I would hold that the fact that Akuila's sole ground of appeal against sentence was not a ground of appeal in the Court of Appeal does not prevent him from seeking to argue it now. As it is, for the reasons given in para 34 above, this ground cannot possibly succeed.

The court's concerns about Akuila's sentence

40. Akuila contended that his sentence was harsh and excessive. He did not explain why. Because he was unrepresented we have looked carefully at whether there are any grounds for saying that the sentence was excessive. Dr Jack's reliance in the Court of Appeal on the oft-quoted passage in *Naikelekelevesi* has brought into sharp focus a problem with a particular feature of the sentencing judge's approach in this case. Having identified the tariff for rape as 7-15 years imprisonment, the judge correctly said that the higher end of the tariff is reserved for the worst kinds of rape. Following the methodology recommended in *Naikelekelevesi*, the judge took 14 years as his starting point. Since the upper end of the tariff was 15 years, the judge plainly regarded this as a bad case of rape. However, the judge then added a further five years for the aggravating factors to which he referred, before reducing the sentence of 19 years' imprisonment which he would otherwise have imposed by two years to reflect Akuila's time in custody awaiting trial and then sentence.

41. *Double-counting*. The problem with this approach is the danger that it might lead to double-counting, by which I mean taking into account more than once in the sentencing process those factors which aggravate the sentence, The judge did not say which factors made this so bad a case that he took a sentence close to the top of the sentencing range as his starting point, but they are likely to have included at least some of the factors which the judge expressly took into account when enhancing his starting point by 5 years to reflect the factors which aggravated Akuila's offending. If they did, this would have been a case of double-counting.

The tendency of this approach to produce double counting has been addressed in a series of judgments of the Supreme Court in recent years.[19]

42. Indeed, this approach is not sanctioned by *Naikelekelevesi*. As the court itself said, "in determining the starting point ... the court is taking cognizance of the aggravating features of the offence". In other words, the aggravating features of the offence are to be reflected in the selection of where within the tariff the starting point should be. The aggravating factors to be taken into account once the proper starting point has been identified are what *Naikelekelevesi* described as "the aggravating features of the offender". If all the aggravating features of the case relate to the offence rather than the offender, there will be no basis for enhancing the starting point over and above its appropriate place in the sentencing range which the tariff represents. That is not to say that a judge can never take as the starting point somewhere above the top of the tariff. That is because the tariffs for particular offences which the appellate courts have identified are only guidelines. They are not tramlines from which deviation is not permitted. However, if a judge proposes to take the exceptional course of passing a sentence outside a particular tariff, he must explain why so that the parties and any appellate court can understand the route which the judge took.

43. I return to the present case. The methodology which the judge used does not necessarily mean that the sentence he arrived has to be set aside. As the Supreme Court said in *Koroikakau v The State* [2006] FJSC 5 at para 13:

> "When a sentence is reviewed on appeal, ... it is the ultimate sentence rather than each step in the reasoning process that must be considered."

This was, on any view, an exceptionally bad case of rape. Rape by a stranger invariably is. In this case, though, in addition to the aggravating factors to which the judge expressly referred, there was the fact that Akuila used his knife on the novice in a particularly distressing and frightening way, he threatened to take her life if she screamed, and in the end he took not just her virginity but also her vocation. All these aggravating features exceptionally justified a starting point above the top end of the tariff. In my opinion, it justified a starting point of 17 years' imprisonment, from which has to deducted one year to reflect that part of the delay in bringing him to trial for which he was not responsible. That brings the sentence down to 16 years' imprisonment.

---

[19] *Seninolokula v The State* [2018] FJSC 5 at paras 19-20 (*per* Keith J), *Kumar v The State* [2018] FJSC 30 at paras 55-56 (*per* Keith J) and *Nadan v The State* [2019] FJSC 29 at paras 38-40 (*per* Keith J).

44. To be taken into account then is the time which Akuila was in custody awaiting trial and sentence. Most jurisdictions do not reflect that in the sentence to be passed. For the most part, the prison authorities are directed to treat the defendant as having already served the part of his sentence which equates to his time in custody on remand. We do it differently in Fiji. We deduct the time the defendant has been in custody on remand from his sentence. So in Akuila's case his sentence must be reduced by a further two years. His sentence will therefore be 14 years' imprisonment. That gives a slightly false impression about the sentence which the court thinks is appropriate. The appropriate sentence in this case is 16 years' imprisonment. That is the length of time he will have to serve subject to the non-parole period and any remission of sentence which he earns. The only difference is that he has to be treated as having already served two years of that sentence when he was sentenced in the High Court.

45. *The non-parole period.* The fixing of a non-parole period has been a source of much litigation and legislative intervention in recent years. The purpose of fixing a non-parole period is now firmly established. It is intended to be the minimum period which an offender has to serve so that the offender will not be released earlier than the court thinks appropriate by the practice of remitting one-third of the sentence for "good behaviour" in prison[20]. However, a problem arose about how the Commissioner of Prisons calculated remission in a case in which the court had fixed a non-parole period. One might have expected the Commissioner to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence or has completed his non-parole period, whichever is the later. In fact, the Commissioner only released the prisoner once he had served the non-parole period *and* two-thirds of the difference between the non-parole period and the head sentence. The Commissioner refused to change his practice despite judgments of the Supreme Court that his practice was liable to be successfully challenged by judicial review[21]. No application for judicial review of the practice was brought, and that was one of the reasons which prompted the Supreme Court to say in *Timo v The State (No 2)* [2019] FJSC 22 at para 36 (*per* Lokur J) that a non-parole period should only be fixed in exceptional cases.

46. That was a questionable approach as section 18 of the Sentencing and Penalties Act made the non-fixing of a non-parole period the exception rather than the norm. The Supreme Court's dictum turned that on its head. The legislature responded quickly. The Act was amended to remove section 18(2) which was the provision which had permitted judges not to fix a non-

---

20 *Bogidrau v The State* [2016] FJSC 5 at para 4 *(per* Keith J)

21 *Kean v The State* [2015] FJSC 27 at para 47 (per Keith J), *Bogidrau* (*op cit*) at para 15 and *Timo v The State (No 1)* [2019] FJSC 1 at paras 40-43 (*per* Keith J)

parole period in an appropriate case. What was left was section 18(1) which required a non-parole period to be fixed in every case in which the sentence was for a term of two years or more. That was the first legislative intervention in the regime relating to non-parole periods. Their second intervention came in an amendment to section 27 of the Corrections Service Act 2006. The effect of that amendment was that the Commissioner has to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence *or* has completed his non-parole period, whichever is the later[22]. That put the calculation of remission back to where it should always have been.

47. The resolution of these issues resulted in some of the court's original pronouncements about the non-parole period being lost sight of. One was important for this case. It was that the non-parole period should not be too close to the head sentence. As Calanchini P (as he then was) said in *Tora v The State* [2015] FJCA 20 at para 2:

> "The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent".

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

Conclusion

48. For these reasons, I would refuse Akuila leave to appeal against his conviction, but I would give him leave to appeal against sentence on the basis that a substantial and grave injustice may otherwise occur, and that the extent to which the Supreme Court can consider a ground of appeal not advanced in the Court of Appeal involves a substantial question of principle affecting the administration of criminal justice.. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for leave to appeal against sentence as the hearing of the appeal, I would allow the appeal against sentence, I would set aside the reduced sentence passed by the Court of Appeal, and I would substitute for it a sentence of 14 years' imprisonment with a non-parole period of 12 years.

22 *Kreimanis v The State* [2023] FJSC 19 at para 17 (*per* Calanchini J).

Young J.

49. I agree that the orders proposed by Keith J should be made and concur entirely with his reasons.

Qetaki J.

50. I have read the judgment of Keith J in draft, and I am in agreement with it, the reasoning and the orders.

Orders:

(1) Leave to appeal against conviction refused.

(2) Leave to appeal against sentence granted.

(3) Appeal against sentence allowed.

(4) The reduced sentence passed by the Court of Appeal is set aside.

(5) Substituted for it is a sentence of 14 years' imprisonment with a non-parole period of 12 years.

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

SUPREME COURT FIJI

The Hon. Mr. Justice William Young
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court